Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Bruce W. and Wanda G. Smith, Individually and as Representatives of the Estate of Justin Wayne Smith, Deceased

Petitioners

v.

Byron Keith Blue, and Harris County

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. Questions Presented for Review

Question Presented for Review #1:

Whether the Court of Appeals for the Fifth Circuit erred in affirming the summary judgment in favor of Byron Blue, on his defense of qualified immunity, when many of the complained of acts and omission were mandatory, ministerial procedures not excused by that defense.

Question Presented for Review #2:

Whether Byron Blue's acts were objectively unreasonable and, therefore, subjectively deliberately indifferent to Justin's known legal rights, thereby eliminating Blue's defense of qualified immunity.

Question Presented for Review #3:

Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment based upon Byron Blue's testimony because his felony conviction for falsifying the observation sign-in sheets in connection with Justin Smith's death under the Texas Penal Code §37.09 makes his testimony unreliable, thus creating a genuine issue of material fact which is properly determined by a jury.

Question Presented for Review #4:

Whether Harris County's policy of warehousing children with known diagnosed mental illness in penal institutions which lacked the capacity to provide adequate medical treatment violated Justin Smith's rights under the 8th and 14th Amendment of the United States Constitution and Texas Statute.

Question Presented for Review #5:

Did Harris County create a hierarchy designed to insulate its policy makers from gaining actual knowledge of obvious constitutional violations.

II. Parties to the Proceeding

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

Petitioner:

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V. Citations of the Official and Unofficial Reports

The *per curiam*, unpublished, opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed in case No. 01-20205, was delivered and filed on April 12, 2002. *See* Appendix A. The prior unpublished opinion of the United States District Court for the Southern District of Texas, Houston Division, in Civil Action No. H-99-1787, was delivered and entered on December 21, 2000. *See* Appendix B.

VI. Basis for Jurisdiction

The unpublished, *per curiam* opinion of the Court of Appeals was entered on April 12, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

VII. Constitutional Provisions and Statutes Involved

Constitution of the Unites States of America, Amendment VIII; Constitution of the United States of America, Amendment XIV; Civil Action for Deprivation of Rights, 42 U.S.C.A. §1983. *(See* text in applicable appendices).

VIII. Statement of the Case

On May 12, 1997, Justin Wayne Smith was taken to Juvenile Detention Westside Command Center, a/k/a the Delta 3 Boot Camp ("Boot Camp") for violating his probation by staying out past his assigned curfew. District Judge Mary Craft, ordered him assigned to the Boot Camp. She found Justin's temporary removal from the custody of his family and placement within the care and custody of Harris County Juvenile Probation Department (HCJPD) to be in his best interest. R. 1604.

Before and shortly after arriving at Boot Camp, numerous evaluations by several private and county, doctors, counselors and psychologists determined that Justin suffered from severe depression, learning disabilities, ADHD and bi-polar disorder. R. 744. At that time, Justin was designated as a "priority" or "target population" case, which should have required that he be placed in a facility with the ongoing ability to properly treat his conditions. R. 732. He was never so assigned or transferred.

Justin was taking Prozac for treatment of his depression for over a year prior to his arrival at Delta 3. Although there were

periods when Justin's prescription ran out, HCJPD doctors generally continued him on the same medication. *Id.* Harris County was aware that, prior to his detention, Justin had "suicidal ideation" and "suicide problems". HCJPD knew that only two months prior to his detention, Justin had actually attempted suicide.

Justin, while a detainee at the Boot Camp, committed suicide on September 2, 1997, by hanging himself with a bed sheet tied to a sprinkler head. **R. 1676-1677, 1679-1680.** At the time of his death, Justin Smith had been left unattended and unsupervised in his confinement cell, as punishment for refusing to come out from underneath his bed. R. 1246.

On the night of his death, the Boot Camp was understaffed and in violation of Texas Juvenile Probation Commission standards for the trainee to staff ratio.[1] R. 1679-1680. According to the post-death investigation conducted by Terry Snow, on September 2, 1997, the Boot Camp was routinely operating under-staffed. Morale of the staff was extremely low. To save time, staff members and

[1] A chronic condition for which the unit was routinely cited, giving direct notice to County Judge Eckels, Chairman of Harris County Juvenile Probation.

supervisors engaged in the routine practice of pre-signing the visual inspection check forms which are posted outside of the trainees' rooms while the trainees are on temporary confinement. *Id.*

During the four months of his incarceration, Justin Smith repeatedly tried to physically harm himself. R. 1247. In the week immediately prior to is death, he repeatedly threatened suicide in front of other detainees, drill instructors, and even his own caseworker. Employees of Boot Camp and Defendant Harris County, were aware of Justin Smith's severe depression, psychological disorders, threats of suicide and even of Justin's previous suicide attempts. Defendants took no action to properly treat and safe guard Justin Smith as his condition deteriorated. R. 744, 1612, 1667. This failure ultimately resulted in Justin Smith's death.

Six days before his death, Justin was caught attempting to commit suicide in the exact same manner in which he eventually died: standing on a table in his cell, trying to attach one end of a sheet around his neck (and the other around a sprinkler head) in an obvious attempt to hang himself. R. 1247. Rather than send Justin for psychiatric care and treatment, Blue put him in "restraints" (a

straight jacket) and a helmet, and left him in isolation, apparently as punishment. A report of this incident was written by the supervisor and sent to Bill Thompson, the Deputy Director of Harris County Institutions; however, it appears the report sat on Thompson's desk, unread, until after Justin killed himself.

Defendant Harris County admits that Boot Camp Employees witnessed Justin Smith harm himself on other occasions. Justin repeatedly banged his head against a wall to the point he was placed in head gear and a straight jacket. He carved words and markings into his body, leaving permanent scars. Superintendent Larry Smith wrote a report stating "trainee Smith was seen standing on a table with a sheet around his neck." Smith "was about to harm himself." R. 1247. Blue again ordered Justin placed in mechanical restraints and head gear. R. 1667. Harris County admits that it did not get Justin medical treatment as follow-up for the August 27, 1997 incident.

This was in direct violation of reasonable medical practice. The Boot Camp should have placed Justin on "suicide watch" and closely monitored him at all times. This was even more necessary in

light of Justin's constant threats of suicide in the week preceding his death. Blue and Harris County continued to be deliberately indifferent to Justin's mounting psychological crisis. Instead of providing proper care, Blue treated Justin as a "discipline" problem. In addition, Harris County chose to deliberately disregard the County's Psychological Screening which classified Justin as both a "priority" and "target population" case and mandated that he be housed in a facility which had the ongoing ability to properly treat him R. 732. Cheryl Hicks was assigned as Justin Smith's caseworker during his confinement at Delta 3. R. 1520. Hicks was aware of Justin's diagnosis of severe depression, prescription for Prozac, and prior suicidal ideation. R. 1570. While Hicks is licensed as a professional counselor, she states that she did not actually counsel Justin and was, in fact, not allowed to do so. R. 1569. The records maintained by Harris County Mental Health and Mental Retardation (MHMR) indicate that Hicks provided individual counseling to Justin a total of (31) thirty one times: she denied it. Terry Snow, who conducted the investigation into Justin's tragic death noted that "the sections normally filled out by the medical department and

caseworker were blank." R. 1679. Harris County refused to allow trained counselors, already on staff, to provide basic counseling to help Justin through this critical time.

On September 1, 1997, Justin Smith was placed in solitary confinement after refusing to come out from underneath his bed and participate in the unit's daily programs. Defendants, although aware of Justin's mental problems and his threats of suicide, kept Justin in solitary confinement, unsupervised and without securing his cell by removing potentially dangerous objects he could use to harm himself. Justin killed himself by making a noose, using his bed sheet, and hanging himself from an improperly anchored sprinkler head. R. 1679-1680.

When a child is placed in temporary confinement, as Justin had been, the HCJPD written policy is to visually check on the child every fifteen (15) minutes. R.829. However, because of staffing cuts, this policy was informally amended allowing for the pre-signing of forms at the beginning of each shift. This is what occurred on the night Justin Smith died. On September 2, 1997, the date of Justin's suicide, written Boot Camp policy would have resulted in visual

checks on Justin every fifteen (15) minutes, with shift supervisors (Defendant Blue) making checks every hour. R. 829. Instead, Defendant Wynn was allowed to initial the inspection form at the start of his shift (showing he checked on Justin Smith every fifteen (15) minutes), when in truth, he was not in the unit for much of that time R. 1676-1677.

Harris County's records, as approved by its supervisor (Blue) on September 2, 1997, reflected that Justin Smith had been routinely observed and monitored every fifteen (15) minutes, through 11:15 p.m. R. 1671. These records were clearly false: Justin Smith was discovered dead at approximately 7:45 p.m. R. 1665. Upon discovering Justin Smith's body, Defendant and Supervisor Blue ordered that the original inspection records be removed and replaced with a report showing visual checks only up until shortly before Justin Smith's death. R. 464.

Defendant Blue, Officer Wynn and many other employees admitted to investigating police officers and to Ms. Snow that it was routine practice as well as the unwritten policy of the Boot Camp to fill out the inspection report at the beginning of their shift, to "speed

up" paperwork and make due with the short staffing. R. 1244, 1679-1680. This was common knowledge and practice with all who worked at the Boot Camp. After Justin's tragic death, Defendant Harris County employee, Terry Snow, concluded in her investigation that:

> a common theme appeared to be the concern from all staff [Boot Camp] interviewed about the 'low morale' caused by Administration. They specifically pointed to Larry Smith [superintendent of Boot Camp]. Staff stated that 'most of the supervisors and D.I.s presigned forms,' and this was common knowledge. Staff cited the 'indifference and lack of involvement' by Larry Smith....it is apparent that this is their perception. The only incident that lends support to this theory is the obvious lack of involvement or follow up of a serious incident of self abusive behavior." *Id.*

Furthermore, the first EMS who arrived at the scene, estimated that Justin Smith had been dead for approximately an hour; confirming that checks had not been properly made (as alleged by Blue) despite the advanced sign ins.

Absent staffing cuts and the change in policy, Justin would have been checked on every fifteen minutes and would, in all likelihood, be alive today. R. 1676, 1679-80. Harris County's policy was to warehouse children, clinically diagnosed as depressed, bi-

polar, etc. in a purely penal facility, denied children including Justin the ability to be overseen by properly trained staff and provided ongoing psychological counseling, timely intervention and other necessary medical care.

Harris County and Byron Blue's actions denied Justin Smith adequate medical treatment to which he was entitled to receive under the 8th Amendment to the Constitution of the United States. In doing so, each also denied Justin his right to have Harris County and its employees protect his (and every child's) best interest.

Plaintiffs Bruce Smith and Wanda G. Smith, Individually and as Representatives of the Estate of their deceased son, Justin Smith, sued Harris County, Byron Keith Blue and Robert Allen Wynn for conditions and actions they believed caused their child's death. On January 17, 2001, the Honorable Nancy Atlas of the United States District Court in and for the Southern District of Texas, Houston Division granted summary judgment on behalf of Blue and Harris County. Judge Atlas also denied Plaintiffs' Request for Entry of Default Judgment as to Defendant Robert Wynn and dismissed all claims against him.

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit regarding those portions of the District Court's Order which granted Defendant Byron Blue and Defendant Harris County's Motions for Summary Judgment. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's Orders; however, its opinion left two of Appellants' questions completely unaddressed.

This Writ of Certiorari presents all issues which were presented to the United States Court of Appeals for the Fifth Circuit as well as presents new issues raised by the Fifth Circuit's opinion.

IX. Argument

Question Presented for Review #1

> Was Byron Blue entitled to invoke the defense of qualified immunity and, therefore, obtain summary judgment on conduct concerning ministerial acts.

The affirmative defense of qualified immunity is only available to governmental officials performing discretionary tasks. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). The duty to make timely required check-ins (or, as the shift supervisor, to ensure that the same are timely made), to contemporaneously complete the

posted log-in sheet as the timely cell checks were completed, and, to "suicide proof" the cells of those children placed or left in isolation during his shift all appear to be routine ministerial tasks, or those that relate to an act that involves obedience to instructions or laws instead of discretion, judgment or skill. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).

The written policies and procedures at Delta 3 Boot Camp required that guards and supervisors , including Byron Blue, monitor and visually inspect detainees in isolation, like Justin Smith, at certain set intervals. This was not done. R. 829, 1680. Those same policies required the check be properly logged in and verified. That ministerial act was also not performed. Finally, Justin's cell was not suicide proofed for the second time in less than a week. All of these duties were ministerial and were the direct responsibility of Byron Blue, the supervisor of the 3-11 shift on September 2, 1999, the day Justin Smith died. R. 829, 1242, 1680.

If it is shown, as Blue suggest, that Harris County varied that policy, a claim Harris County denies, at minimum a fact issue exists, also precluding summary judgment. There is no evidence that

officers, such as Blue, had any written grant of authority making their performance of these duties discretionary. R. 829, 1242. The language of the policy manual is clear and unequivocal regarding the periodic checks and log-ins. It states "Juveniles **shall** be checked and documented a minimum of every fifteen (15) minutes. BACK AND FRONT OF FORM **MUST** BE COMPLETED." R. 829. (emphasis added). Byron Blue's failure to properly perform these ministerial acts violated Justin's rights: for those actions (and omissions) the defense of qualified immunity offers no protection. *See Harlow*, 457 U.S. at 818. The District Court erred in excusing Blue's conduct under his claim of qualified immunity. (The Court of Appeals' failure to address this issue was also error.)

Question Presented for Review #2

> Was Blue's denial of Justin's clearly defined 8th and 14th Amendment rights and his failure to protect Justin's best interest objectively unreasonable in light of the surrounding circumstances?

Certain of Blue's actions were arguably discretionary. To the extent they were found to be so, the defense of qualified immunity is only available if Blue's conduct, in light of those rights, was objectively reasonable and, therefore, did not constitute

subjective deliberate indifference. Section 1983 creates a private right of action against those individuals violating our rights while acting under the color of law. Section 1983, extends a duty of care to both prisoners and pretrial detainees. *Hare v. City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996). It includes a prisoner's right to have his basic human needs reasonably met during his period of forced confinement, including the right to receive medical care and to be protected from self-inflicted harm. *Id.* In cases such as Justin's, the courts recognize that "a serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills." *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986). To deny such basic needs violates the Eighth Amendment's prohibition against cruel and unusual punishment as extended under the due process clause of the Fourteenth Amendment. *See Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388, 394 (5th Cir. 2000).

The doctrine of qualified immunity is designed to "'give ample room for mistaken judgments (for discretionary acts or for violations of vague or obscure laws) by protecting 'all but the

plainly incompetent or those who knowingly violate the law." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995); *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998) *citing Malley v. Briggs*, 475 U.S.335, 341, 106 S.Ct. 1092 (1986). Therefore, the defense of "qualified immunity" would not shield these Defendants from liability only if Blue's actions were done in subjective deliberate indifference to Justin Smith's clearly established legal right.

The government's failure to provide pre-trial detainees with adequate protection from their known suicidal impulses is clearly defined and, therefore, actionable under §§ 1983. *Burns v. City of Galveston, Texas*, 905 F.2d 100, 104 (5th Cir. 1990); *Partridge*, 791 F.2d at 1188. In order to determine whether evidence was presented raising an issue of Byron Blue's subjective deliberate indifference to Justin Smith's 8th Amendment Rights, the Court was required to apply traditional summary judgment standards. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970 (1994); *see also Smith v. Brenoettsy*,

158 F.3d 908, 913 (5th Cir. 1998) The question of whether a prison official had the requisite knowledge that a substantial risk existed is a question of fact for the jury. A jury may conclude that a prison official knew of a substantial risk simply from the very fact that the risk to the inmate or detainee was obvious." *Farmer*, 511 U.S. at 842.

Here the risk of fatal, self inflicted harm by (Justin) was open and obvious. On August 27, 1997, only six days prior to Smith's suicide, Blue noticed Justin repeatedly standing on a table with a sheet, then a blanket, held up around his neck. R. 1667. Once Blue found Justin standing on a table with a sheet in his hands, he not only had *actual knowledge* that Justin was threatening suicide, but Blue also knew that, unless the sheets in his cell were removed, Justin also had a plan, the manner and means to make his death happen. This alone is sufficient evidence for a jury to conclude that Blue's later action in leaving Justin in isolation without confirming that his sheets were removed or that regular checks were made and documented was not objectively reasonable. (After the earlier incident, Blue checked the pre-printed line which stated that he believed "(Justin) is or potentially is going to inflict harm on

himself" which supported Blue's decision to place Justin in restraints and a helmet SIX DAYS BEFORE HIS DEATH. It also discredits Blue's masturbation explanation.) R. 1669. On August 27, all items of property were eventually removed from Justin's cell and Justin was placed under "constant watch". Still no medical treatment was ordered and his case worker was not alerted to his suicidal condition. R. 1667, 1242.

Justin's records reflected his diagnoses of sever chronic depression, bipolar disorder and ADHD. Blue knew Justin had been denied visits and contact with his family. Blue knew his confinement was extended shortly before Justin's scheduled release. He knew that Justin was evaluated in early August and put on "constant watch." Blue knew that, on the day of Justin's death, Justin was being punished for refusing to come out from underneath his bed. A genuine issue of material fact existed as to whether an objective officer, in light of these facts, would deny Justin routine checks, leave sheets in his room and not get him medical help, in light of Justin's 8th Amendment rights.

> Did further inquiry into whether an official's conduct was "objectively reasonable"become moot once the official

denied that he acted with subjective deliberate indifference to the claimant's well defined legal rights?

The lower courts found Blue's own affidavit to be dispositive on the question of subjective deliberate indifference. Petitioners complain that not only did this violate traditional summary judgment standards, but that here, where the affiant is a defendant, employee convicted of fabricating evidence in this case, his affidavit was incompetent for summary judgment purposes. While at trial it may create a fact issue, subjecting him to harsh impeachment; for summary judgment purposes it is so tainted as to constitute no evidence of any weight sufficient to deny Petitioners' their day in court. The Court of Appeals and the District Court opinions, while giving a cursory acknowledgment to Petitioner's objective reasonableness contentions, essentially ruled based on an outcome determinable fashion, relying exclusively on Blue's own self-serving statement. Blue said he did not possess subjective, deliberate indifference to Justin's rights and, therefore, such indifference must not exist.

Since Blue's mind set is not an objective fact which would be "readily controvertible" and "because qualified immunity turns

only upon the objective unreasonableness of the defendant's acts, a particular defendant's subjective state of mind has no bearing on whether the defendant is entitled to qualified immunity." *Thompson v. Upshur County, Texas*, 245 F.3d 447, 457 (5th Cir. 2001). In short, what Blue says he thought is neither controlling or, for that matter, even particularly relevant, especially in this case.

Since the court is required to draw all possible inferences that can be drawn from the underlying facts in deference to the non-movant's position and to construe any conflicts in non-movant favor, to allow this type of evidence is without purpose or effect. Blue's affidavit and testimony should instead be stricken, for purposes of summary judgment, rather than have Petitioner's struggle as to what weight, if any, the Courts will place on an affidavit, if such a reprobate. *See Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999); *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001) *citing Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987).

Blue must be required to show that his conduct was objectively reasonable before he is entitled to be excused under the

doctrine of official immunity. To do so, Blue should have provided the Court with evidence sufficient to allow it to "put itself in the shoes of a reasonable officer as he or she approaches a given situation and how he or she would assess the likelihood of danger in a particular context." *United States v. Rideau*, 969 F.2d 1572, 1574 (5th Cir. 1992) (emphasis added). If, under scrutiny, the evidence raises a fact issue such that a reasonable official would understand that what the charged official is doing violates the Plaintiff's rights, summary judgment is improper.

Justin was a deeply depressed, suicidal young man who terribly missed his family. He was sent to Delta 3 because he had stolen a bicycle and violated curfew. R. 1604. The ultimate goal of the District Court was placing him in an environment that would foster and promote Justin's best interests. *Id.* The breaches of these rights by Byron Blue are serious constitutional violations. They are even more wanton because of Justin's status as a minor with diagnosis of severe psychological and emotional illnesses. Byron Blue acted unreasonably in light of the circumstances and the law as established at the time of Justin Smith's untimely death. Blue

possessed actual, subjective awareness of Justin Smith being on the brink of suicide, yet chose to do nothing to protect Justin's constitutional rights. R. 829. At the time of Justin Smith's death, it is uncomprehensible to believe that any objective officer behaving reasonably would have disregarded so many actual prior suicide attempts as well as violated established policy designed to protect against such tragedies. Accordingly, the granting, and affirmation of the District Court's summary judgment was improper.

Question Presented for Review #3

> Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment based upon Byron Blue's testimony because his felony conviction for falsifying the observation sign-in sheets in connection with Justin Smith's death under the Texas Penal Code §37.09 makes his testimony unreliable, thus creating a genuine issue of material fact which is properly determined by a jury.

Byron Blue was convicted of the felony charge of "Tampering with or Fabricating Physical Evidence" under Section 37.09 of the Texas Penal Code. *See* Tex. Pen. Code Ann § 37.09 (Vernon 2000). This charge and conviction was a direct result of his intentionally destroying the original sign in sheet next to Justin's

cell in an effort to protect himself from possible repercussions surrounding Justin's death. R. 464.

Rule 609 of the Federal Rules of Evidence provides that the credibility of a witness can be attacked if the witness has been convicted of a crime which was punishable by imprisonment of one year. *See* Fed. R. Evid. 609. Blue was sentenced to five years in prison. R. 464. Additionally, the credibility of a witness may be attacked by showing that the witness has been convicted of a crime involving dishonesty or false statement, regardless of punishment. *Id.* A conviction under Texas Penal Code Section 37.09 would have subjected Byron Blue to impeachment under both sections of Federal Rule of Evidence 609. Despite these convictions and the aggravating factor that the conviction was for conduct destroying and fabricating evidence relating to Justin Smith's death, the District Court gave Blue's testimony full and complete credibility, even on an issue not subject to independent verification e.g., subjective intent. In this instance, Blue's testimony merely creates a fact issue for a jury. By accepting Blue's testimony as true, the District Court held direct contrary to relevant summary judgment case law. *See Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505 (1986) (holding that credibility determinations are jury functions, not those of a judge.) As an interested witness, Byron Blue's testimony alone, whether or not controverted by circumstantial evidence, could not be taken as sufficient to conclusively establish the issue of whether Blue possessed subjective awareness of Justin's suicidal condition. R. 1721-26

At the very least, a genuine issue of material fact existed as to whether Byron Blue exhibited subjective deliberate indifference to violations of Justin's constitutional rights.

Question Presented for Review #4

> Whether Harris County's policy of warehousing children with known diagnosed mental illness in penal institutions which lacked the capacity to provide adequate medical treatment violated Justin Smith's rights under the 8th and 14th Amendment of the United States Constitution and Texas Statute.

During Justin's time of confinement at Delta 3, Harris County and the facility had access to Justin's medical history including his diagnosis, medication and even a written history of his first suicide attempt. R. 744. They also had later incident reports, completed by Delta 3's own staff, which indicated that Justin had

physically mutilated himself on several occasions and only days before his death was found repeatedly trying to tie a sheet around his neck, apparently in an effort to commit suicide. R. 1247. Harris County's Medical Assessment of Justin completed prior to his being taken into custody, shows that Harris County had actual knowledge of Justin's multiple diagnoses, treatment with Prozac and Ritilin and his past behavioral problems, learning deficits and his earlier suicide attempt. R. 1612. The assessment actually noted that Justin had suicide ideations and prior suicide "problems." *Id.* The psychological screening conducted by Harris County noted that Justin posed a danger towards himself. R. 1607. The report recommended individual counseling to treat Justin's depression. R. 1606. At the time of his confinement, Justin Smith was a child under the meaning of Title III of the Texas Family Code. R. 1604; *See* Tex. Fam. Code Ann. Title III (Vernon 2000). The Order that placed Justin at Delta 3 indicated that it was in the best interest of Justin and his health, safety, morals and education to be taken from his home and entrusted to the care of Harris County. *Id.* The moment that Justin's life and liberty were taken from him and placed outside the

control of his family, Harris County became entrusted with responsibility to protect his individual liberties best interests. R. 1604. "The infant is always a ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care so that no injustice be done him." *du Pont III v. Southern National Bank of Houston*, 771 F.2d 874, 882, (5th Cir. 1985), *cert. denied* 475 U.S. 1085, 106 S.Ct. 1467 (1986). In order to adequately protect Justin's interests, Harris County could not merely warehouse Justin but rather, had to faithfully discharge the court's order so as to provide medical care and protect his best interests while he was within its care. R 1604.

Question Presented for Review #5

> Did Harris County create a hierarchy designed to insulate its policy makers from gaining actual knowledge of obvious constitutional violations.

The Harris County Juvenile Board ("HCJB") has had the dubious distinction of being in the vanguard of all the unethical, uncaring, and sometime even illegal actions which have been perpetrated by some of the largest American Corporations and governmental entities. Enron and WorldCom are prime examples of

the extent of deceitfulness to which CEO's and members of the Board of Directors engage in shell games, imposing multiple layers themselves from the actual actors who perform the primary misdeeds on the corporation's behalf. By doing so, those at the top can remain unresponsive and unaccountable and avoid being charged with knowing what unethical and illegal acts their employees were performing to accomplish the corporation's goals: to better its projections and increase its bottom line. The HCJB has attempted to insulate itself, just like the leaders of these now infamous corporations, from knowing what was actually happening in their respective organization so they too may avoid legal liability.

The HCJB has insulated itself from exposure to liability under 42 U.S.C. 1983 by creating layer after layer of bureaucracy, ultimately leaving the HCJB intentionally ignorant of every individual case prior to the time as that child becomes a "statistic." They have deliberately created layers and set policies which prevent the upward flow of critical information so as to eliminate its knowledge of problems in the day to day operations of the various HCJD facilities including the "boot camps". R. 1359. This insidious

system of not having established policies and procedures for the upward transfer of pertinent information led to the tragic death of Justin Smith. This purposefully developed scheme, done to insulate and shield the HCJB from responsibility for violating a child's constitutional rights is itself unconstitutional.

Apart from the over crowding, under-staffing and budget cuts Harris County and it's Board appear unaware of what actual policies were in place at Delta 3. R. 1353-54. This blatantly self-serving layer of insulation appears designed to protect Harris County from Section 1983 liability. These intentional, built-in blind folds (from actual knowledge) were, in essence, a "don't ask, don't tell policy." The Juvenile Board and those individuals required to report directly to them knew few listened anyway, so better just,"don't ask." Those working at Delta 3 knew few listened anyway so, better just, "don't tell." This allowed the Juvenile Board to conveniently maintain that they truly "did not know" of the "official" "unofficial" policy" that was being carried out at Delta 3. The victims of this insulation scheme are Justin and his family. Those who suffered because Harris County utterly failed to carry out its duty of protecting every child's

best interests.

X. Conclusion

Petitioners provided the trial and appellate courts with sufficient evidence to meet their burden to defeat Byron Blue and Harris County's Motions for Summary Judgment. The court not only erroneous excluded Petitioners evidence (such as the Snow report/investigation which the court ruled to be "hearsay" which was clearly an admission by a party opponent), but took as definitive the affidavit of a convicted, interested witness who fabricated and destroyed evidence in this case. The court ignored the requisite standards and presumptions required in the consideration of summary judgment motions and allowed that which was objectively intolerable to be excused as subjectively plausible.

Our judicial system should not tolerate blatant perjury. Byron Blue and the HCPD set the example for Justin Smith and hundreds of children like him. It hid and cut corners while holding Justin for months for stealing a bicycle and breaking curfew.

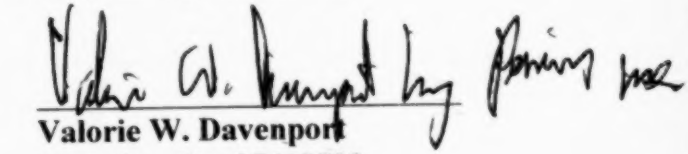
While the tragedy which occurred on September 2, 1997 cannot be changed, this Court should: objectively determine what is

reasonable, what is right and what is just; ensure that those who set the standard cannot absolutely shield themselves to avoid accountability; condemn perjurers and reaffirm the value of a child's life; enforce the need for adequate medical care to treat all forms of clinical depression and other brain based disorders; and reaffirm the right of juries to review and determine, in those situations where it is recognized and proper, fact issues surrounding the propriety of the workings of our government and the conduct of those operating under color of law.

Harris County's actions and policy in failing to provide adequate medical treatment and its failure to zealously protect Justin Smith (and every child's best interests), has left one child dead. It, like Byron Blue, should face a Harris County jury and be made to answer for its actions.

WHEREFORE PREMISES CONSIDERED, Appellants respectfully pray that this Court set aside the District Court's granting of Summary Judgment in favor of Byron Blue and Harris County and remand this case to the District Court for a trial on the merits. Appellants also pray for such other relief, at law or in equity, general or specific, to which they may be justly entitled.

Respectfully submitted,



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ATTORNEY FOR PETITIONERS

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A. The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed in case No. 01-20205, was delivered and filed on April 12, 2002 1

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Supreme Court, U.S.
FILED

02 385 JUL 11 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

Bruce W. and Wanda G. Smith, Individually and as Representatives of the Estate of Justin Wayne Smith, Deceased

Petitioners

v.

Byron Keith Blue, and Harris County

Respondents

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT U. S. COURT OF APPEALS
CHARLES & FULBRUGE III
CLERK

No. 01-20205
Summary Calendar

BRUCE W. SMITH, Etc.; ET AL.,
Plaintiffs,

BRUCE W. SMITH, Individually and as Representative of the Estate of Justin Wayne Smith, Deceased; WANDA G. SMITH, Individually and as Representative of the Estate of Justin Wayne Smith, Deceased,
Plaintiffs-Appellants,

versus

BYRON KEITH BLUE, Etc., ET AL.,
Defendants,

BYRON KEITH BLUE, Acting Individually and in his official capacity; ROBERT ALLEN WYNN, acting individually and in his official capacity; HARRIS COUNTY,
Defendants-Appellees.

Appeal from the United States District Court for
The Southern District of Texas
(USDC No. H-99-CV-1787)

Before REAVLEY, HIGGINBOTHAM and WIENER, Circuit Judges.

PER CURIAM: *

Plaintiffs Bruce and Wanda Smith appeal from the district court's grant of summary judgment against them on their civil rights claims stemming from the suicide of their son, Justin Smith, while in the custody of Harris County at a boot camp for juvenile offenders. They have abandoned their claims under 42 U.S.C. § 1985 and the Texas Tort Claims Act and do not appeal the dismissal of civil rights claims against defendant Wynn. Only their 42 U.S.C. § 1983 claims against Harris County and Byron Blue, a shift supervisor at the facility, are before us. After a *de novo* review of the record, we affirm.

A. Byron Blue

The district court granted Blue's motion for summary judgment on qualified immunity grounds. To determine whether a government official is entitled to qualified immunity, we determine, "(1) whether the plaintiff has alleged a violation of a clearly established constitutional right; and (2) if so, whether the defendant's conduct was objectively unreasonable in light of clearly established

law at the time of the incident."[1]

In the present case, the Smiths have alleged an Eighth Amendment violation, arguing that the Delta 3 facility and Blue failed to provide for Justin's "basic human needs, including medical care and protection from harm."[2]

However, they have failed to show that Blue's conduct was objectively unreasonable. In the Eighth Amendment context, officials are only liable for episodic acts or omissions resulting in harm to a prisoner or detainee if they have "subjective knowledge of the risk of serious harm to a [prisoner] but respond[] with deliberate

---

Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Jacobs v. West Feliciana Sheriff's Dep't., 228 F.3d 388, 393 (5th Cir. 2000). The Smiths argue that qualified immunity should not even have been triggered in this case because they claim that Blue had a non-discretionary obligation to make room checks every fifteen minutes. Fifteen-minute checks of juveniles on temporary confinement were to be made by the floor supervisor, not the shift supervisor. As a shift supervisor, Blue was responsible for making.

[2] Id.(quoting Hare v. City of Corinth, 74 F.3d 633, 650 (5th Cir. 1996) (en banc) (Hare

indifference."[3] The knowledge of the risk is measured subjectively, because "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."[4] In the absence of knowledge that there was a substantial risk Justin would commit suicide, it is not possible to say that Blue's alleged failure to check in on Justin constituted deliberate indifference, and thus could not have been objectively unreasonable in light of existing case law.[5]

We agree with the district court that the plaintiffs have not created a disputed issue of material fact as to Blue's subjective knowledge of the risk that Justin would commit suicide. The Smiths

---

regular checks on all temporary confinees every two hours. There is no evidence to contradict his statement, corroborated by Cheryl Hicks, that he checked rooms at 6:00 p.m. on September 2, his last scheduled check before Justin hung himself.

[3] Id. at 394 (quoting Hare II, 74 F.3d at 650).

[4] Farmer v. Brennan, 511 U.S. 825, 838 (1994).

[5] See Hare v. City of Corinth, 135 F.3d 320, 328-29 (5th Cir. 1998) (Hare III) ("[J]ailers must take measure to prevent inmate suicides *once they know* of the suicide risk.") (emphasis

maintain that Blue had actual knowledge of the risk, because of past instances in which Justin had manifested an intent to harm himself. As recently as August 27, 1997 Blue had placed Justin in restraints after it was reported to him that Justin had been found standing on a table or sink with a sheet. Blue marked a report that he had used restraints because he thought Justin might hurt himself. Blue denies that he thought the August 27 incident was an attempted suicide, stating in his affidavit that he assumed Justin had been trying to cover a window with the sheet and that restraints were needed to prevent Justin from continuing to climb on furniture or fixtures.

Even if we assumed that the August 27 incident could only have been interpreted by Blue as a likely suicide attempt, the district court correctly found that to be insufficient to create a dispute as to whether on the evening of Justin's suicide almost one week later, Blue subjectively believed that there was a significant risk Justin would take his own life. By August 28, Justin had been taken off close observation by other Delta 3 personnel. Blue stated that since August 27 he had seen and interacted with Justin and he appeared to be doing well. On the evening that he committed suicide, Justin was

not on suicide watch. He had been placed in "temporary confinement," a disciplinary measure, before Blue came on duty. Blue had no psychological training to added) judge suicide risk. There is no evidence that on September 2, Justin said or did anything that would have made the risk of suicide "obvious" to Blue. Finally, the Smiths have no response to Blue's assertion that he did not think Justin *could* commit suicide by hanging himself because he thought the sprinkler head Justin used was designed to prevent that exact occurrence.[6]

B. Harris County

Because there is no evidence that Harris County policymakers acted with indifference, there is no liability on the part of the County.[7] We note also that the Smiths' arguments that Harris County violated their son's rights by "warehousing" him in a facility lacking the ability to treat depression and other

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[6] The Smiths in fact asserted as a theory in this case that the specially designed sprinkler head was improperly installed.

[7] See Olabisiomotosho v. City of Houston, 185 F.3d 521, 526 (5th Cir. 1999).

psychological problems, and that Harris County deliberately attempted to shield itself from liability by building layer upon layer of bureaucracy, are new on appeal and we decline to review them.[8]

Accordingly, we affirm the judgment of the district court.

[8] See Leverette v. Louisville Ladder Co., 183 F.3d 339, 342 (5th Cir. 1999).

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. **01-20205**
Summary Calendar

D.C. Docket No. H-99-CV-1787

BRUCE W SMITH, Etc; ET AL
Plaintiffs

BRUCE W SMITH; Individually and as Representative of the Estate of Justin Wayne Smith, Deceased; WANDA G SMITH, Individually and as Representative of the Estate of Justin Wayne Smith, Deceased

Plaintiffs - Appellants

V.

BYRON KEITH BLUE, Etc; ET AL
Defendants

BYRON KEITH BLUE, Acting Individually and in his official capacity; ROBERT ALLEN WYNN, acting individually and in his official capacity; HARRIS COUNTY
Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston.
Before REAVLEY, HIGGINBOTHAM, and WIENER, Circuit

Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Smith v. Blue

01-20205

UNITED STATES COURT OF APPEALS FOR THE FIFTH

CIRCUIT *2002 U.S. App.*

April 12, 2002, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR **HISTORY:**
United States District Court for the Southern District of Texas. H-99-CV- 1787.

DISTRICT OF TEXAS

MICHAEL N. MILBY
CLERK OF COURT
P O BOX 61010
HOUSTON, TEXAS 77208

www.txs.uscourts.g

To: Valorie W Davenport (aty)

Re: Notice of Entry of Order or Judgment

Enclosed Order or Judgment entered in:

Case number: 4: 99-cv-01787

instrument number: 123

If after three attempts this fax fails, then we will print this notice and mail it to you. For questions, please call (713) 250-5768.

Number of pages including cover sheet: 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUCE W. and WANDA G. SMITH, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
	§	
v.	§	**C. A. NO. H-99-1787**
	§	
BYRON KEITH BLUE, Et al.,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum and Order entered this day and its Memorandum and Order dated December 21, 2000 [Doc. # 118], it is hereby

ORDERED that Plaintiffs' Motion for Leave and Request for Entry of Default

Judgment [Doc. # 121] is DENIED;

ORDERED that all claims against Defendant Robert Allen Wynn arc DISMISSED WITHOUT PREJUDICE.

This is a final judgment.

SIGNED at Houston, **Texas, this 17th day of this 17th day of January 2001.**

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

To: Valorie W. Davenport: (atty)

Re: Notice of Entry of Order or Judgment

Enclosed Order or Judgment entered **in:**

Case number:4: 99-cv-01787

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Number of pages including cover **sheet: 6**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUCE W. and WANDA G. SMITH, *et al.*,	§	
Plaintiffs,	§	
v.	§	C.A. Action NO. H-99-1787
BYRON KE1TH BLUE, *et al.*,	§	
Defendants.	§	

MEMORANDUM AND ORDER

In a Memorandum and Order dated December 21, 2000 [Doc. # 118] ("December Order"), this Court granted summary judgment on all claims in favor of Defendant Byron Keith Blue and Defendant Harris County. In the December Order, this Court ordered the Plaintiffs to show cause why all claims against Defendant Robert Allen Wynn ("Wynn"), **who** has not filed a responsive pleading **in this case,** should not be

dismissed. On January 5, 2001[1], Plaintiffs filed a Motion for Leave and Request for Entry of Default Judgment [Doc. # 121] against Defendant Wynn. Having considered Plaintiffs' motion and all matters of record, the Court concludes that Plaintiffs' Request for Entry of Default Judgment should be dealed. Moreover, the claims against Wynn will be dismissed without prejudice for Plaintiffs' failure to prosecute their claims against him.

Default judgments *are generally disfavored. Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998); *Sun Bank v. Pelican Homestead and Savings Ass 'n,* 874 F.2d 274, 276 (5th Cir. 1989). Any doubts regarding the propriety of entering default should be resolved with the end of securing *a trial on the merits. Lacy v. Site1* Corp., 227 F.2d 290, 292 (5th Cir. 2000). Entry of default is not automatic. If the plaintiff cannot

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[1] On December 29, 2000, Plaintiffs filed a Motion to Enlarge Time to Respond [Doc. #1191 asking that they be given until January 5, 2001 to file **a response to the Court's order to show** cause. That motion is granted.

show that service of process was properly made, the district court lacks jurisdiction over the defendant and cannot enter *default. Leedo Cabinetry v. Jamea Sales and Distribution, Inc,* 157 F.3d 410, 412 (5th Cir. 1998); *Carimi v. Royal Caribbean Cruise Line, Inc.,* 959 F.2d 1344, 1345 (5th Cir. 1992). Moreover, a "defendant's default does not in itself warrant the court in, out in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishtmatsu Co., Ltd. v. Houston Nat'I Bank, 515* F.2d 1200, 1206 (5th Cir. 1975); CJC *Holdings, Inc. v. Wright & Lato, Inc.,* 979 F.2d 60, 66 n.4 (5th Cir. 1992) (party not entitled to default judgment where pleadings fail to establish cause of action as a matter of law).

Federal Rule of Civil Procedure 4(e) states, in relevant part, that a plaintiff may make service by delivering a copy of the complaint and summons "to the individual personally" or "by leaving copies thereof at the individual's dwelling house or usual place. of abode." Rule 4{e) also allows a plaintiff to make

service upon a defendant pursuant to the law of the state in which the district court is located. In addition to allowing for service via personal delivery or certified mail, Texas Rule of Civil Procedure 106 states that:

> Upon motion supported by Affidavit stating the location of the defendant's usual place of business or usual place of abode or place where the defendant can probably be found and slating specifically the facts showing that service has been attempted [by personal delivery or certified mail] at the location named in the affidavit but has not been successful, the court may authorize service (1) by leaving copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the **defendant notice of the suit.**
>
> The Court finds that Plaintiffs have not made proper service upon Defendant Wynn.

In their First Amended Original Complaint [Doc. # 27] ("Complaint"), Plaintiffs state that

Defendant Wynn resides at 7930 Corporate Drive, # 79, Houston, TX, 77036. Complaint, ~]8. According to the Return of Service filed with this Court, service was made upon James Wynn, Defendant Wynn's brother, at RR-5 Box 6470, San

Augustine, TX, 75972-9177. See Summons [Doc. # 29]. Plaintiffs have not shown, under Fed. R. Civ. P. **4(e)(2) that** copies of the complaint and summons were left at Defendant Wynn's dwelling house or usual place of abode. Nor have Plaintiffs complied with the requirements of Tex.

R. Civ. P. 106(b).

In addition, the Court finds that Plaintiffs' Complaint fails to state any federal claims against Defendant Wynn. In their Complaint Plaintiffs alleged a civil rights claim under 42 U.S.C. § 1983 and a conspiracy claim under 42 U.S.C. § 1985. The Court finds that Plaintiffs' conclusory allegations that Wynn was deliberately indifferent to the substantial risk that Justin would commit suicide do not entitle Plaintiffs to entry of default. In addition, Plaintiffs

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[2] This conclusion is also consistent with the Court's findings in its December Order. There, the Court held that Defendant Blue and Defendant Wynn's failure to properly complete Justin Smith's room check form (and, in Defendant Wynn's case, to actually check on Justin) did not in and of itself constitute subjective deliberate indifference. Plaintiffs' summary judgment evidence failed to show that Justin's behavior near the time of his death revealed **that he was acutely suicidal.**

failed to plead all the necessary elements of their conspiracy claim, as discussed in the Court's December Order. See id. at 55-57.

Plaintiffs also alleged that the Defendants (not naming Wynn specifically) were liable for wrongful death under the Texas Tort Claim Act in failing to remove potentially **dangerous items of tangible property (towel, sheet, clothing, and knit bag) from Justin** Smith's cell. See Complaint, §§ 55-61. Plaintiffs expressly waived this claim as to the **Defendants in their summary judgment briefing, stating that the only Texas Tort Claims Act** they were pursuing was on= regards the condition of the sprinkler head in Justin's cell, from which Justin hanged himself. See Memorandum in Support of Plaintiffs' Response to Defendants Byron Blue and Harris County's Motions for Summary Judgment, at 26. There is no factual basis apparent from the record for this claim against Wynn. Moreover, there are no allegations, let alone evidence,

that Wynn had the responsibility or authority to deprive **Justin of the items Plaintiffs allege were potentially dangerous.**

The Court accordingly finds that Plaintiffs are not entitled to entry of default because proper service was never made on Defendant Wynn and the Court did not obtain jurisdiction over him. The Court further finds that entry of default is not proper because Plaintiffs have not shown that they arc entitled to default against Wynn on the basis of their pleadings. Plaintiffs have not pursued proper service or factual development of their claim during the pendency of this case, which is almost two years old. Plaintiffs therefore have demonstrated a lack diligence in prosecuting this claim and it will be dismissed without prejudice. It is therefore

ORDERED that Plaintiffs' Motion to Enlarge Time to Respond [Doe. # 119] is

GRANTED. It is further

ORDERED that Plaintiffs' Motion for Leave and Request far Entry of Default Judgment [Doc. # 121] is

DENIED. It is further

ORDERED that Plaintiffs' claims against Robert Allen Wynn **are** dismissed without prejudice for failure to prosecute.

A separate final judgment will be issued forthwith.

SIGNED at Houston, Texas, this 17th day of January, 2001.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BRUCE W. and WANDA G. SMITH, individually and as representatives of the ESTATE OF JUSTIN WAYNE SMITH, deceased, and KRISTA SMITH,	§	
Plaintiffs,	§	
v.	§	C. A. NO. H-99-1787
BYRON KEITH BLUE, ROBERT ALLEN WYNN, and HARRIS COUNTY,	§	
Defendants.	§	

OPINION

On September 2, 1997, sixteen-year-old Justin Wayne Smith ("Justin") hanged himself while in the custody of Harris County's Juvenile Probation Department. Plaintiffs Bruce W. Smith, Wanda G. Smith, and Krista Smith, Justin's parents and sister, bring this suit under 42 U.S.C. § 1983, alleging *that* Justin's suicide was the result of deliberate indifference on the part of Byron Keith Blue ("Blue") and Robert Allen Wynn ("Wynn"), the county employees responsible

for monitoring Justin on the night of his death[1], Plaintiffs also contend that various failures by Defendant Harris County ("County") to adequately train its personnel and to adequately maintain its premises resulted in Justin's death.

Defendant Blue and Defendant County have filed motions for summary judgment. *See* Defendant Byron Blue's Motion for Summary Judgment [Doc.# 97] ("Blue Motion"); Defendant Hams County's Motion for Summary Judgment [Doc.# 93] ("Harris County Motion").[2] Plaintiffs have responded.[3] In addition, Defendant County has filed a Motion to Exclude Testimony of Plaintiffs' Experts Thomas A. Rosazza and Leo J. Borrell, M.D. [Doc. # 95]

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[1] Both Blue and Wynn were discharged from employment as a result of Justin's suicide. Wynn failed to respond to the complaint, and his current whereabouts are unknown.

[2] Defendant County has also filed an Appendix of Exhibits in Support of its Motion for Summary Judgment [Doc. # 94] ('Harris County Appendix I") and an Appendix of Additional Authorities in Support of its Motion for Summary Judgment [Doe. # 95] ('Harris County Appendix II").

[3] *See* Plaintiffs' Response to Defendants Byron Blue and Harris County's Motions for Summary Judgment [Doe. # 106]; Memorandum in Support of Plaintiffs' Response to Defendants Byron Blue and Harris County's Motions for Summary Judgment [Doc.# 107] ("Plaintiffs' Memorandum").

("Motion to Exclude"). The Court, having considered the parties' motions, responses, replies, all matters of record and the applicable authorities, concludes that Defendant Byron Blue's Motion for Summary Judgment should be granted; Defendant Harris County's Motion for Summary Judgment should be granted; and Defendant Harris County's Motion to Exclude should be granted.

I. BACKGROUND FACTS

The Harris County Juvenile Probation Department ("HCJPD") provides for the assessment, placement, detention and rehabilitation of young criminal offenders in Harris County, Texas.[1]

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[1] Defendant County argues that Plaintiffs should have sued HCJPD, contending that HCJPD is not a county entity but rather a separate governmental entity. Defendants analyze the issue under a multi-factor test derived from Fifth Circuit case law regarding the determination of a governmental unit as either a state or county entity. *See Flores v. Cameron County, Texas,* 92 F.3d 258, 264-65 (5th Cir. 1996) (and citations therein). The Court is not persuaded by Defendant's attempts to apply this test to HCJPD. *Cf. Darby v. Pasadena Police Dept.*, 939 F.2d 311, 313 (holding that police department's ability to sue or be sued determined whether it was an independent governmental entity). Defendant also cites several opinions of the Texas Attorney General. See Harris County App. II. While these opinions constitute probative evidence, they are not binding authority on this Court. Moreover, these opinions address general issues regarding the power of juvenile probation boards *vis-a-vis* county commissioners' courts to make contracts and authorize expenditures; the opinions do not address the precise issue Defendant raises here. Additionally, none of the opinions addresses Harris

HCJPD is supervised by a board (composed of the county judge, all juvenile court judges, three judges from the family, civil, and criminal courts, as well as one justice of the peace) and the chief juvenile probation officer. In 1997, Elmer Bailey was HCJPD's Chief Juvenile Probation Officer.

HCJPD is divided into six divisions, each headed by a deputy director: Budget, Human Resources, Administrative Services, Court Services, Field Services, and Institutions. *See* Deposition of William H. Thompson (Ex. D to Plaintiffs' Mere.) ("Thompson Deposition"), at 43. Bill Thompson was the Deputy Director of Institutions in 1997.

The HCJPD's Institutions Section operates four post-adjudication placement facilities where juveniles are placed pursuant to determinations of the juvenile court, one of which is Delta 3 Boot

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County and its laws in particular.

In any event, the Court need not resolve the question of the separateness of the HCJPD in order to adjudicate the parties' motions for summary judgment. Given the inadequacy of the record and the briefing on this issue, the Court declines to do so.

Camp ("Delta 3').[10] Delta 3 was established to provide a structured environment combining discipline, supervision and rigorous physical training based on a military model for serious and chronic juvenile offenders. Juveniles placed at Delta 3 are called "trainees." During the time Justin was a trainee at Delta 3, the boot camp had a rated capacity of 100 trainees. *See* Juvenile Custodial Death Report (Ex. A-2 to Plaintiffs' Mem.), at 2. Larry A. Smith was the superintendent of Delta 3 during all times relevant to this action.

Delta 3 provides a four-phase rehabilitation program. *See* Delta 3 Boot Camp Manual (Ex. 6 to Harris County App. I) ("Delta 3 Manual"), § 4.01. A trainee passes to the next phase, and eventually graduates from boot camp, when he attains a certain number of "points" which are awarded for each day the trainee follows the prescribed program without incident. During Phases One and Two, the trainees reside at the boot camp. Trainees are housed in jail-type cement cells equipped with a metal frame bed, toilet, sink

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[10] The Institutions Section also operates the Burnett-Bayland Home, the Burnett-Bayland Reception Center, and the Harris County Youth Village. See Deposition of Cheryl Hicks (Ex. B to Plaintiffs' Mere.) ("Hicks Deposition'), Vol. 1, at 73-75.

and desk.[·····] *See* Deposition of Larry A. Smith (Ex. C to Plaintiffs' Memo ("L. Smith Deposition"), at 37-38. Phases Three and Four, during which the trainee resides at home, emphasize reintegration into the family and community. Delta 3 Manual, § 4.01. Phases One, Two and Three are each designed to last 60 days. Phase Four lasts until the juvenile court determines the trainee has completed the program. *Id.*

Delta 3 is staffed with drill instructors, floor supervisors, and shift supervisors. Delta 3 also employs a medical staff and caseworkers. Each trainee is assigned a caseworker, all of whom are certified juvenile probation officers. The probation officer/caseworker monitors the progress of the trainee, apprising the juvenile court of when the trainee will be released and preparing necessary paperwork. *See* Hicks Dep., Vol. 1, at 19-20. The caseworker usually meets with the trainee on a daily basis and may also provide basic counseling. However, caseworkers are not trained to provide psychological or psychiatric evaluations of trainees. *See*

[·····] HCJPD facilities differ in approach and security level. Burnett-Bayland Home, for example, is a community-based low security facility which provides cottage-type housing. L. Smith Dep., at 20.

id., Vol. 1, at 152-53. Delta 3 was not staffed with any on-site psychiatric or psychological service providers. Any mental health evaluations of trainees were performed by Harris County's Mental Health Mental Retardation Authority ("MHMRA") personnel, who would travel to Delta 3 upon request.[.....] *Id.*, Vol. 1, at 132-33, 152-53. Although not equipped to provide professional psychiatric services, boot camp staff and caseworkers are trained to recognize and document signs and symptoms of mental illness and chemical dependence. L. Smith Dep., at 97-98. Staff and caseworkers are also required to undergo an annual sixteen-hour course in crisis prevention and intervention. L. Smith Dep., at 73; Delta 3 Manual, § 4.06.

All incidents in which a trainee "acts out," disobeys staff, or refuses instruction are documented in writing. Major incidents are recorded in written reports which are forwarded to supervisory staff and to the Deputy Director's office. An incident report also is filled

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[.....]Trainees may also be evaluated by psychologists from the Department of Psychological and Social Services. It is unclear from the record what relationship that department bears to Delta 3 or HCJPD generally.

out whenever a trainee exhibits "psychotic and/or neurotic behavior," "suicidal symptoms," or depression. *See* Delta 3 Manual, § 3.13, Appendices 21, 23. In extreme circumstances, in which a trainee is likely to inflict harm on himself, others, or Delta 3 property, supervisory staff may place a trainee in mechanical restraints. *See id.*, § 4.08. An incident report must be written any time a trainee is placed in mechanical restraints. Boot camp regulations mandate that medical and clinical staff assess a trainee who has been placed in mechanical restraints. *See id.*, Appendix 24.

In May 1997, juvenile authorities placed Justin in Delta 3 Boot Camp. Justin had a substantial history of disciplinary problems, criminal violations, and substance abuse. At the time Justin entered Delta 3, he was diagnosed with a depressive disorder and was taking Prozac. In addition, several evaluations by various Harris County entities had documented Justin's suicidal ideation as well as a previous suicide attempt. *See* Psychological and Social Services Post-Admission Referral Form (Ex. A-20 to Plaintiffs' Mem.); Harris County Juvenile Detention Center Physical Assessment, Feb. 19, 1997 (Ex. A-21 to Plaintiffs' Mem.); MHMRA Psychological

Screening, Feb. 21, 1997 (Ex. A-22 to Plaintiffs' Mem.), at 2. These records were transferred to Delta 3 as part of Justin's master file. *See* Hicks Dep., Vol. 1, at 107-08. Cheryl Hicks, Justin's caseworker at Delta 3, was aware of these assessments. *Id.*, Vol. 2, at 50-51[·]:

By the end of July 1997, Justin had progressed through Phase One into Phase Two of Delta 3's program. Until this point, Justin had been involved only in minor infractions. However, towards the end of the month, disciplinary problems caused Justin to be "recycled" to Phase One.[·····] On July 30, 1997, Justin was found banging his head against his cell door. Justin was placed in mechanical restraints *(i.e.,* his arms and legs cuffed behind him) for forty-five minutes. During this time he was counseled by Patrick Leake, a floor supervisor, Byron Blue, and by Cheryl Hicks. *See* L. Smith Dep., at 153-55; Shift Supervisor Report, July 30, 1997 (Ex. A-12 to Plaintiffs' Mere.). On August 1, 1997, Justin was penalized with the loss of twelve points *(i.e.,* four days of time) for cursing and disobeying a drill instructor.

[·····] Hicks observes that anxiety over graduating from Phase Two and returning home caused Justin to "act out." *See* Hicks Dep., Vol. 2, at 34-37. Hicks notes that Justin "did have problems throughout the program initially even... [1]ittle problems, but on an ongoing basis it was as he was anticipating release that these problems began." *Id.*, Vol. 2, at 35.

The incident report reflects "fight for an hour . . . .There's too much actions [sic] against this resident to list, even though D.I. [drill instructor] realizes that trainee has some mental problems." L. Smith Dep., at 162.

In the month of August 1997, mental health personnel saw Justin three times. On August 5, 1997, D.F. Games, a psychologist from the Department of Psychological and Social Services, evaluated Justin. Games opined that Justin's behavior was "manipulative" and merely an effort to be transferred out of the boot camp. He recommended that Justin remain at Delta 3 unless his "behavior deteriorates to a degree that Delta 3 staff view [him] as unmanageable in that setting." Games also recommended that Justin be kept on close observation.[.....] *See* Memorandum from D.F. Games to Larry Smith, August 5, 1997 (Ex. 17 to Harris County App. I).

Justin participated in an evaluation by Dr. McGinnis, an MHMRA psychiatrist, on August 15, 1997.[.....] *See MHMRA*

[.....] The record does not indicate whether Justin was indeed placed on close observation following Games's evaluation.

[.....] The evaluation lists "depressive sxs, angry outburts, fighting, and self-destructive acts" as the reason for referral. Apparently, Justin had also been placed in mechanical restraints earlier in the

Psychiatric Evaluation, August 15, 1997 (Ex. 18 to Harris County App. I). McGinnis noted that Justin had recently engaged in "cutting behaviors, carving girlfriends [sic] initials on his forearm and writing 'fuck the world' across his stomach." *Id.* The evaluation also noted "Hx of suicidal threats, but no attempts since here." *Id.* A case management assessment by Hicks on the same day noted, "Youth verbalizes thoughts of wanting to harm himself." Hicks Assessment, at 1. The assessment noted that Justin displayed the following behaviors within the last two months: suicidal ideation, threats or attempts; physically aggressive threats or behavior; self injurious, risk taking, or dangerous behavior; temper tantrums; sleep disturbances; fighting; and agitation. *See id.* at 3.

Finally, on August 22, 1997, Dr. Terry, an MHMRA psychiatrist, evaluated Justin. *See* Service Data Form, August 22, 1997, (Ex. 19 to Harris County App. I). Dr. Terry's notes indicated that while Justin expressed past feelings of sadness and suicidal ideation at night, Justin had "no present suicidal ideation or plans" and that "Clt [client] not presently harm to self or others." However,

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week. *See* Case Management Assessment, August 15, 1997 (Ex. 18 to Harris County App. I) ("Hicks Assessment"), at 1.

Dr. Terry prescribed an increase in Justin's Prozac prescription, from ten to twenty milligrams per day. *Id.*

On August 27, 1997, Justin was again placed in mechanical restraints because of his conduct.[.....] At approximately 9:50 p.m., Delta 3 staff found Justin standing on the table in his cell holding a sheet. *See* Incident Report of Byron Blue, August 27, 1997 (Ex. 11 to Harris County App. I). Blue's Incident Report stated as follows:

> Trainee Smith in Room 45 with a sheet and standing on his table in his room. Staff quickly removed the items from Trainee. After removing items from Trainee's room Trainee was counsel [sic] about his behavior. Trainee was unresponsive and simply smile [sic] .... Staff left Trainee to check on another problem. Moments later, Sgt Perry inform [sic] that Trainee Smith was placing his blanket at his door preventing Staff from being able to observed [sic] him. Staff responded. Staff remove [sic] blanket from Trainee's room. Staff then asked trainee did he plan to continue the acts that he was displaying. Trainee responded yes.

The report noted that, in addition to Blue, two other staff members witnessed the incident. Blue's Shill Supervisor

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[.....] At that time, Justin had already been placed in temporary confinement (£ e., room restriction) due to an incident of fighting with another trainee which had occurred two days before. L. Smith Dep., at 164-65.

Report, completed along with the Incident Report, listed as the reason for placing Justin in restraints: "Trainee demonstrated that he was about to do harm to himself." *See* Ex. A-4 to Plaintiffs' Mem.

According to Delta 3 procedure, Superintendent Smith was required to fill out an "exception report" documenting the incident. Exception reports were forwarded daily to both Bill Thompson, Deputy Director of Institutions, and to all Juvenile Court judges. *See* Exception Report, August 28, 1997 (Ex. A-5 to Plaintiffs' Mem.). Smith's exception report stated the following, "Trainee Smith was mech'ically restrained after repeated attempts to fie sheet, blankets, etc. around neck while standing on his desk in his room. All items were removed and placed on constant watch." *Id.*

On September 2, 1997, Justin was again placed in temporary confinement for disobeying orders. Justin had refused to participate in morning drills and was found hiding beneath his bed. Temporary confinement, which is actually room restriction, is a disciplinary measure.[.....] *See* Delta 3 Manual, § 6.08(D). Trainees placed on

[.....] Temporary confinement is not synonymous with suicide watch. Suicidal youths are placed on "constant watch" status, here they are

temporary confinement are checked at fifteen minute intervals in order to monitor the trainee's behavior and ensure that the trainee is not harming himself or property within his cell. Floor supervisors are responsible for checking the trainee every fifteen minutes; shift supervisors are responsible for making room checks every two hours. A "room check" form is posted on the wall of the trainee's cell. Supervisors must initial the form as they perform their checks, signifying that the trainee has been checked at the appropriate intervals.

On September 2, Blue wag.the shift supervisor. Wynn had been called to fill in for the scheduled floor supervisor. *See* Affidavit of Byron Keith Blue (Ex. 1 to Blue Motion) ("Blue Affidavit"), ¶ 24. At approximately 4:30 p.m., Wynn left the premises to perform various duties at Blue's instruction. In Wynn's absence, Blue instructed another staff member, Sergeant Perry, to assume floor supervisor duties. Blue Aft., ~[26. Blue himself checked Justin at 4:00 p.m. and at 6:00 p.m. *Id.*, ¶¶25, 27. Wynn returned to the boot

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monitored continuously at all times. L. Smith Dep., at 81-88.

camp at approximately 7:00 p.m.[1] *See* Statement of Robert Allen Wynn (Ex. A-8 to Plaintiffs' Mere.) ("Wynn Statement"). No staff member checked Justin after approximately 6:45 or 7:00 p.m.[2]

At approximately 7:45 p.m., Justin was found in his cell hanging from a sheet tied around his neck and looped over a fire sprinkler installed in the ceiling. Justin was found by drill instructor Emory Dwaine Johnson, who passed by Justin's cell while on his way to check on another trainee. *See* Statement of Emory Dwaine Johnson (Ex. A-9 to Plaintiffs' Mem.). Neither Delta 3 staff nor the

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[1] According to Blue, Wynn was to resume the duties of floor supervisor when he returned to the boot camp, including making the fifteen minute checks. Blue Aft., ~j 31. However, Wynn's understanding was that Sergeant Perry would continue to make the checks on the trainees in temporary confinement. Wynn Statement, at 4. Keith Crouch, a trainee who was also on temporary confinement, stated in an affidavit prepared the day after Justin's death that Wynn checked on him and Justin at 7:00 p.m. ..*gee* Statement of Keith Richard Crouch (Ex. A-25 to Plaintiffs' Mere.). However, Wynn's own statement contradicts this assertion.

[2] A report was written by Terry A. Snow, Bill Thompson's assistant and the administrative liaison for the Institutions Division, after an internal investigation of Justin's suicide. Memorandum from Terry A. Snow to Bill Thompson, September 8, 1997 (Ex. A-1 to Plaintiffs' Memorandum) ("Snow Report"). The report stated that Justin was not checked after 6:30 p.m. Snow did not interview Blue or Perry in making her report.

paramedics who arrived at the scene were able to revive Justin.

One of the paramedics attending to Justin at approximately 8:40 p.m. noticed that the "room check" form had been initialed as if Justin had been checked until 10:45 p.m. *See* Statement of Shelley Ann Squires (Ex. A-6 to Plaintiffs' Mem.) ("Squires Statement"). Subsequently, Wynn admitted that he had pre-signed the form at the start of his shift. *See* Wynn Statement, at 2. The room check form also reveals that Blue had pre-signed his checks for 8:00 p.m. and 10:00 p.m.[.....]

Prior to Justin's death, no trainees had ever committed suicide at Delta 3. Hicks Dep., at Vol. 2, at 81-82. However, trainees had previously been removed from the boot camp because of their suicidal threats or tendencies. L. Smith Dep., at 69.

Plaintiffs, Justin's parents and sister, filed suit against Wynn and Blue, in their individual capacities, and against Harris County in the Southern District of Texas, Galveston Division, on February 12, 1999. The case was transferred to this Court on June 7, 1999.

[.....] The record indicates that Defendant Blue, and possibly other Harris County officials, engaged in conduct tending to obscure the circumstances of Justin's death.

Plaintiffs allege that Wynn and Blue violated Justin's constitutional rights by failing to properly monitor Justin while he was in temporary confinement. See Plaintiffs' First Amended Original Complaint [Dec. # 27] ("Complaint"), ¶¶ 29-36. Plaintiffs allege that Harris County violated Justin's constitutional rights by (1) condoning the widespread custom or practice, which mounted to official policy, of Delta 3 staff pre-signing room check forms; and (2) failing to train Delta 3 staff in the recognition and treatment of suicidal tendencies. *Id.*, ¶¶ 37-49. Plaintiffs also claim wrongful death under the Texas Tort Claims Act.[1] In addition, Plaintiffs claim that various Harris County officials engaged in a conspiracy to cover up the circumstances of Justin's death, in violation of 42 U.S.C. § 1985. On October 13, 2000, Defendants Harris County and Byron Keith Blue filed motions for summary judgment on all pending claims.

II. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court must

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[1] Plaintiffs also pled products liability claims against Grunau Company, Inc., the company that manufactured the sprinkler heads installed in Delta 3 cells. This Court granted Grunau Company's motion for summary judgment in its Memorandum and Order dated September 1, 2000 [Doc.#81].

determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) *(en banc); Boze v. Branstetter,* 912 F.2d 801; 804 (5th Cir. 1990). Material facts are those facts "that might affect the outcome of the suit under the governing law." *Smith v. Brenoettsy,* 158 F.3d 908, 911 (5th Cir. 1998) *(quoting Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). The facts are to be reviewed with all "justifiable inferences" drawn in favor of the party opposing the motion. *See Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir. 1..998) *(citing Anderson,* 477 U.S., at 255). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy -that is, when both parties have submitted evidence of contradictory facts." *Laughlin v. Olszewski,* 102 F.3d 190, 193 (5th Cir. 1996).

The party moving for summary judgment has the initial

burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. The movant meets this initial burden by showing that the "evidence in the record would not permit the nonmovant to carry its burden of proof at thai." *Smith,* 158 F.3d at 911. The burden then shifts to the nonmovant to demonstrate that summary judgment is inappropriate. *See Morris,* 144 F.3d at 380. This is accomplished by producing "significant probative evidence" that there is an issue of material fact so as to warrant a trial, *see Texas Manufactured Hous. Ass'n v. Nederland,* 101 F.3d 1095, 1099 (5th Cir. 1996), *cert. denied,* 521 U.S. 1112 (1997); *Taylor v. Principal Financial Group, Inc., 93* F.3d 155, 161 (5th Cir. 1996); *Transamerica Ins. Co. v. Avenell, 66* F.3d 715, 718-19 (5th Cir. 1995); *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir. 1994), and that is "sufficient to support a jury verdict." *Morris,* 144 F.3d at 380; *accord Doe v. Dallas Indep. School Dist.,* 153 F.3d 211, 215 (5th Cir. 1998). This burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *See, e.g., Morris,* 144 F.3d at 380. Likewise, "unsubstantiated or conclusory assertions that a fact issue exists" do

not meet this burden. *See id.* Instead, the nonmoving party must present specific facts which show "the existence of a 'genuine' issue concerning every essential component of its case." *Id.* Dispute about a material fact is genuine only if evidence is such that reasonable jury could return a verdict for nonmoving *party. See Stafford v. True Temper Sports,* 123 F.3d 291, 294 (5th Cir. 1997); *Hanks v. Transcontinental Gas Pipe Line Corp.*, 953 F.2d 996, 997 (5th Cir. 1992). In the absence of any proof, the court will not assume *that the* nonmovant could or would prove the necessary facts. *See McCallum Highlands, Ltd. v. Washington Capital Dus, Inc., 66* F.3d 89, 92 (5th Cir.), *revised on other grounds upon denial of reh* 'g, 70 F.3d 26 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) *(en banc),* 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871,888 (1990)). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fats to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *See Little,* 37 F.3d at 1075 (citing *Celotex,* 477 U.S. at 322).

III. ANALYSIS

A. Claims Under § 1983

Section 1983 creates a private right of action for the redress of violations of constitutional rights by those acting under color of state law. Prisoners and pre-trial detainees have the right to adequate medical care, including the right to be protected from self-inflicted harm. Such a right is derived from the Eighth Amendment's prohibition on creel and unusual punishment or the Fourteenth Amendment's guarantee of due process. *See Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388 (5th Cir. 2000); *Wagner v. Bay City, Texas*, 227 F.3d 316 (5th Cir. 2000); *Olabisiomotosho v. City of Houston*, 185 F.3d 521 (5th Cir. 1999); *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) *("Hare* 1211").....

Plaintiffs allege that Harris County, as well as Blue and Wynn in their individual capacities, violated Justin's right to protection from self-inflicted harm. The failure to protect a prison

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..... Four *Hare* opinions have been issued by the Fifth Circuit: The first is *Hare v. City of Corinth*, 22 F.3d 612 (5th Cir. 1994); the second *is Hare v. City of Corinth*, 36 F.3d 412 (5th Cir. 1994); the third is cited in the text; and the fourth is *Hare v. City of Corinth*, 135 F.3d 320 (5th Cir. 1998) *("Hare IV").*

inmate or jailed detainee from self-inflicted harm is considered an "episodic act or omission." In such a circumstance, "an actor is interposed between the [prisoner/detainee] and the municipality, such that the [prisoner/detainee] complains first of a particular act, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission." *Flores v. County of Hardeman, Texas,* 124 F.3d 736, 738 (5th Cir. 1997) (noting that plaintiff's allegations of county's failure to train employees or to adequately staff jail where detainee committed suicide fell under the "episodic act or omission" standard). *See also Jacobs,* 228 F.3d at 393; *Hare* III, 74 F.3d at 647-48.

A municipal employee can only be held liable for an episodic act or omission alleged to have caused a violation of the prisoner/detainee's rights if the employee was subjectively deliberately indifferent to those rights. In other words, the employee is only liable where he "had subjective knowledge of a substantial risk of serious harm to a [prisoner/detainee] but responded with deliberate indifference to that risk." *Hare* IV, 135 F.3 d at 324 (5th

Cir. 1998) (citing *Hare* III, 74 F.3d at 650).

In order to hold a municipality liable for the episodic acts or omissions of its employees, a plaintiff must show that (1) a municipal employee violated the inmate's right to be free from self-inflicted harm with subjective deliberate indifference, and that (2) the violation resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference. *Flores,* 124 F.3d at 738. A failure to pass the first prong of the test ends the inquiry. If the plaintiff cannot show that an employee acted with subjective deliberate indifference, there is no municipal liability. *Id.*; *Olabisiomotosho,* 185 F.3d at 528-29.

1. Section 1983 Claims Against Blue and Wynn in Their Individual Capacities

Plaintiffs allege in their Complaint that Blue and Wynn were deliberately indifferent to Justin's right to be protected from self-inflicted harm when they failed to "monitor, observe and safeguard" Justin on a "timely basis." Complaint, ~l 33. Plaintiffs base their allegations on evidence that Blue and Wynn pre-signed Justin's temporary confinement room check form on September 2, 1997. Defendant Blue responds that he did not know Justin was suicidal,

and that he performed all of his checks. Blue also claims that his actions are protected by qualified immunity.

a. ***Legal Standard for Qualified Immunity***

Municipal employees sued in their individual capacity may invoke the doctrine of qualified immunity. Qualified immunity "shields government officials performing discretionary functions from liability unless their conduct violates clearly established constitutional fights of which a reasonable person would have known." *Gibson v. Rich, 44* F.3d 274, 277 (5th Cir. 1995) (citing *Babb v. Dorman,* 33 F.3d 472,477 (5th Cir. 1994)). In other words, this doctrine "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Hunter v. Bryan,* 502 U.S. 224, 228 (1991)).

The evaluation of a claim of qualified immunity involves a two-step process. First, the plaintiff must allege a violation of a clearly established constitutional right. Second, the court must determine whether the defendant's actions were objectively reasonable under existing clearly established law. *Jacobs,* 228 F.3d

at 393 (citing *Hare IV*, 135 F.3d at 325); *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997).

b. Analysis of the Existence of a Constitution Violation

Plaintiffs have alleged a violation of Justin's fight to be free from self-inflicted harm while detained at the Delta 3 boot camp. As discussed above, the relevant standard for determining a violation by a municipal employee of this fight was definitively set forth in *Hare* III. In that case, the Fifth 'Circuit noted that it had "traveled a peripatetic route in invoking different measures of the constitutional fights of pretrial detainees to medical care and protection from harm." *Hare III*, 74 F.3d at 643. Nevertheless, the court found "much consistency" in its prior cases and held that subjective deliberate indifference was the proper standard for gauging the culpability of a municipal employee for an episodic act or omission.

Id. Hare III was decided in January 1996. Thus, the subjective deliberate indifference standard, the current standard in place in the Fifth Circuit, was in place prior to and during Justin's stay at Delta 3.

A prison inmate or jail detainee has a constitutional right to

protection from self-inflicted harm. However, the threatened harm must be a *serious* harm. In the context of suicide cases, the Fifth Circuit has clarified that a municipal employee cannot be considered to have displayed deliberate indifference unless the inmate/detainee presented a "substantial and significant" risk of committing suicide. *Jacobs*, 228 F.3d at 395. The mere possibility that an inmate/detainee will harm himself is not enough to invoke constitutional protections. A municipal employee who has no clear signals that the inmate/detainee actually is suicidal cannot be said to have been deliberately indifferent: At most, failure to recognize the potential suicide would make the employee negligent. Thus, in *Flores, the* Fifth Circuit found that the county sheriff had not displayed deliberate indifference in removing suicide precautions, even though these actions ultimately resulted in the detainee's succeeding in killing himself. The court of appeals focused on the fact that the detainee gave no indication of suicidal tendencies at the time the suicide precautions were removed. *Flores,* 124 F.3d at 736. S*ee also Sibley v. Lemaire,* 184F.3d481,489 (5th Cir. 1999), *cert. denied,* 120 S. Ct. 1420 (2000) (finding no deliberate indifference where detainee

did nothing that "so clearly indicated an intent to harm himself that the deputies caring for him could have only concluded that he posed a serious risk of harm to himself').

In the recent case *of Jacobs v. West Feliciana Sheriff's Department,* the Fifth Circuit applied its deliberate indifference standard to deny qualified immunity. *In Jacobs,* the sheriff was aware that the detainee had attempted to commit suicide just before she was arrested. The detainee was placed on suicide watch, but was put in a cell which was partially obscured from observation and which contained several "tie-off" points (from which a makeshift rope easily could be suspended). In addition, the sheriff knew that another inmate had previously committed suicide while placed in the same cell. *Jacobs,* 228 F.3d at 390. The court of appeals held that a jury could find that the sheriff was deliberately indifferent to the detainee's risk of committing suicide when he allowed her to have a sheet and towel. *Id.* at 397. *Jacobs* illustrates that the deliberate indifference standard requires substantial evidence demonstrating the probability of strong suicidal tendencies and the means for the prisoner to accomplish that goal.

Plaintiffs have not presented facts to support a constitutional violation by Blue or Wynn in failing to protect Justin from suicide. Plaintiffs have not pointed to probative evidence that suggests that Blue or Wynn was subjectively deliberately indifferent, or even aware of, a serious risk that Justin would commit suicide. Blue states that he did not believe Justin presented suicidal tendencies on September 2, or at any time during his stay at Delta *3*. *See* Blue Aff., ¶ 9.[.....] Plaintiffs have not pointed to any evidence that Justin's behavior on September 2, or the two or three preceding days, *should have* put Blue on notice that Justin was going to commit suicide, much less any evidence that Blue was deliberately indifferent to that risk. When Blue arrived for his shift at 3:00 p.m. on September 2, Justin was in temporary confinement. He was not on suicide watch. Blue was given no reason to think that Justin had been placed there for any reason other than disciplinary infractions. Blue saw and/or

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[.....] Plaintiffs object that Blue's affidavit is not competent summary judgment evidence because Blue gives opinions or testifies to matters outside his personal knowledge. The Court holds that Blue's affidavit is competent evidence for matters about which Blue had personal knowledge, including more importantly his own perceptions, knowledge and opinions about Justin during late August and early September 1997, before Justin died. Justin during late August and early September 1997, before Justin died.

spoke briefly with Justin at 4:00 p.m. and 6:00 p.m. He was given no indication that Justin was planning to commit suicide. Neither Blue nor Hicks, Justin's caseworker, both of whom saw Justin that day, believed there to be anything out of the ordinary about Justin's behavior. Blue Aff., ¶¶ 25, 27, 25, 40; Hicks Dep., Vol. 2, at 67-69. Additionally, Keith Crouch, the other trainee in temporary confinement that day, mentioned in his post-incident statement nothing about Justin's behavior on September 2 that would have given an observer cause to believe that Justin was going to commit suicide that day. *See generally* Crouch Statement.

Plaintiffs rely on the August 27 shift supervisor's report in which Blue noted that Justin potentially was going to harm himself. Plaintiffs' Mere., at 5-6. This report does not satisfy Plaintiffs' burden. The report addresses matters both too remote in time and too vague as to the "harm" Justin was causing himself to be legally probative of Justin's intent to commit suicide on September 2.

In addition, Blue was not responsible for, nor capable of making, psychological evaluations of Justin. There is no evidence of deliberate indifference by Blue. On August 27, Blue checked the pre-

printed line, "Child is or potentially is going to inflict harm on himself' (and wrote the same in the blank below) as the rationale for placing Justin in restraints. *See* Ex. A-4 to Plaintiffs' Mere. A/though Blue had found Justin standing on his table with a sheet in his hands on August 27, Blue's uncontradicted testimony is that he did not believe Justin was going to commit suicide. As Blue states in his affidavit, he believed that Justin's intent was to cover the window on his cell door in order to masturbate or use the toilet. Blue Aft., ¶ 11. Blue states that he placed Justin in restraints in order to keep Justin from hurting himself by climbing on the toilet and table and also to keep him from misbehaving. [1] *Id.*, ¶ 12.

Justin's behavior between August 27 and September 2 did not indicate to Blue that Justin was suicidal, let alone acutely suicidal. Blue notes that when he observed Justin on August 30, 1997, Justin appeared to be compliant and in good spirits. Blue states that on that

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[1] The Court recognizes that, as a result of the incident, Blue placed Justin in a helmet and a four-point restraint *(i.e.,* hands and legs restrained behind his back). All items of property were removed from the cell, and Justin was put on close observation (fifteen minute checks). Blue states that he decided to "err on the side of caution." Blue Aft., ¶ 13. In any event, this incident was almost a week before Justin's death.

day "[at] around 9:00 p.m., I had a conversation with the trainees. I gave them sandwiches and some milk, and we talked about the future. Trainee [Justin] Smith told me he was going to get his act together. This appeared to me to be a positive sign and indicative of a positive attitude." *Id.*, ¶ *18.*

Plaintiffs emphasize, in support of their deliberate indifference contentions, that Blue failed to follow Delta 3's policy regarding signing room check forms. As shift supervisor, Blue was responsible for checking Justin every two hours. Blue admits that he "pre-signed" the room check form for his 8:00 p.m. and 10:00 p.m. checks as a time-saving device. Blue Aft., ¶ 46. This technical violation of Delta 3 policy does not rise to the level of proof that Blue was deliberately indifferent to a substantial risk that Justin would commit suicide. As discussed above, Justin was not on suicide watch. Moreover, there is simply no evidence that Blue failed to perform his assigned checks at each of the appropriate times, notwithstanding his deviation from record-keeping protocols.

Nor can deliberate indifference be inferred from Blue's knowledge that Wynn also pre-signed the room check form. Blue

states that although he was aware that Wynn pre-signed the form, he "fully expected Mr. Wynn (or the acting floor supervisor in his absence) to conduct all his duties, including making routine checks." Blue Aft., ~ 46. *See Farmer v. Brennan*, 511 U.S. 825, 844 (1992[) ("Prison officials charged with deliberate indifference might show.., that they knew of the underlying facts [indicating a sufficiently substantial danger] but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent"). Plaintiffs have proffered no contradictory evidence.

The evidence of record also fails to establish a genuine question that Wynn was deliberately indifferent to Justin's safety generally or that Wynn was deliberately indifferent to a substantial risk that Justin would commit suicide. Wynn both pre-signed the room check form and apparently failed to check Justin between approximately 7:00 p.m. and 7:45 p.m. Nevertheless, Wynn was doing an errand for Blue and then offered a viable explanation for his failure to check Justin thereafter, namely, that he believed another officer was making the room checks. *See* Wynn Statement. Justin's behavior on September 2, as observed by the Delta 3 staff earlier in

the evening, did not indicate a significant or substantial risk that he would commit suicide. Plaintiffs have pointed to no evidence that Wynn had any notice or actual knowledge that Justin was acutely suicidal on September 2. Thus, Wynn's failure to check on Justin at 7:15, 7:30 and 7:45 p.m. cannot be considered deliberate indifference to the risk that Justin would seriously harm himself. The Court notes Keith Crouch's statement that Wynn checked on him and Justin at 7:00 p.m. *See* Crouch Statement. This conflict in the evidence is insufficient to create a genuine fact issue on Wynn's knowledge and intent to suggest deliberate indifference. At most, Crouch's recollection is a scintilla of evidence that, alone, would not support a jury verdict in Plaintiffs' favor on this issue. *See Doe v. Dallas Independent School District,* 153 F.3d 211, 215 (5th Cir. 1998) (noting that 'It]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to preclude summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff.') (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

Accordingly, Plaintiffs have not established a genuine

question of material fact that Justin's constitutional rights were violated by Blue or Wynn. Therefore, Blue and Wynn are entitled as a matter of law to qualified immunity.

c. Objective Reasonableness

In episodic act or omission cases, as noted above, the official only violates the inmate/detainee's constitutional rights if he acts with subjective deliberate indifference. Thus, the second prong of the qualified immunity analysis asks whether the "conduct of the [official] was objectively unreasonable when applied against the standard of deliberate indifference." *Jacobs*, 228 F.3d at 394. Put another way, Plaintiffs must show that Blue and Wynn's actions were not only objectively unreasonable, but also that Blue and Wynn intended the consequences of their actions. *Wagner*, 227 F.3d at 324.

Because the court has determined that Wynn and Blue were not subjectively aware that Justin was suicidal on September 2, the Court concludes that their actions also were not objectively unreasonable. Therefore, Plaintiffs have failed to meet their burden to demonstrate a triable question under either prong of the qualified immunity analysis as to Defendants Blue or Wynn.

2. Section 1983 Claims against Harris County

a. Deliberate Indifference by Delta 3 Staff

To recover under § 1983 against Defendant County, a municipality, Plaintiffs first must show that a municipal employee violated Justin's constitutional rights with subjective deliberate indifference. As discussed previously, "'[d]eli'berate indifference' requires that the official have subjective knowledge of the risk of harm . . . . .Mere negligence will not suffice, and '[d]eliberate indifference, *i.e., the* subjective intent to cause harm, cannot be inferred from a... failure to act reasonably.'" *Wagner*, 227 F.3d at 324 (citing *Hare III*, 74 F.3d at 649).

Plaintiffs contend that the evidentiary record raises genuine issues of material fact as to whether Delta 3 employees, in late August or early September 1997, were aware of and ignored a substantial and significant risk that Justin would commit suicide. First, Plaintiffs point to various psychological evaluations noting Justin's history of depression, suicidal ideation, and prior suicide attempt, as interpreted by Plaintiffs' psychiatric expert Leo J. Borrell, M.D. Second, Plaintiffs rely on representations made by Keith

Crouch that Justin had told Delta 3 staff members of. his intentions to commit suicide. Third, Plaintiffs point to incident reports made by Delta 3 staff which note that Justin as potentially going to cause himself harm.

Expert Report of Leo J. Borrell, M.D. - Plaintiffs rely heavily upon the report of their psychiatric expert, Dr. Leo Borrell ("Borrell Report"), as evidence that establishes that Delta 3 personnel failed to properly recognize Justin's suicidal symptoms, and that this failure caused Justin's death. *See Plaintiffs'* Mem., at 10 (¶18), 12 (¶ 32). Defendant Harris County ("County") has filed a Motion to Exclude the Borrell Report on the grounds that the Report fails to meet the Fed. R. Civ. P. 26(a)(2)(B) standards for disclosure of expert testimony.[1] Plaintiffs have not submitted any affidavit by Dr. Borrell or other supplement to his Report. Rather, Plaintiffs seek additional time to supplement Dr. Borrell's Report, contending simply that discovery was completed close to the discovery deadline and, to complete his analysis, Dr. Borrell needed the additional

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[1] Defendant also moved to exclude expert testimony of Thomas A. Rosazza. Plaintiffs have withdrawn their designation of Rosazza. *See* Plaintiffs' Response to Defendant Harris County's Motion to Exlcude Testimony of Plaintiffs' Experts [Doc. #103], ¶ 6.

information provided by Defendants

late in the case.[1]

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure states that an expert report must be a "complete statement of all opinions to be expressed and the basis and reasons therefore." The Advisory Committee Notes to Rule 26 state that expert reports must be "detailed and complete," not "sketchy and vague." A district court has the discretion to strike an expert because the expert's report fails to comply with the "detailed and complete" requirement. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 571 (5th Cir. 1996). Moreover, Rule 16(o) of the Federal Rules of Civil Procedure provides for the district court to create binding pretrial deadlines to guide the parties and make pretrial proceedings orderly and fair. District judges "have the power to control their dockets by refusing to give ineffective

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[1] As particulars, Plaintiffs point solely to the deposition of Deputy Director Bill Thompson, which was taken after the deadline for disclosure of experts. See Plaintiffs' Response, ~[15. However, Plaintiffs do not identify what information in the Thompson Deposition is relevant to Dr. Borrell's opinions. The Court, having examined the Thompson Deposition, can discern no reason why Thompson's deposition was critical to preparation of a supplement to the Borrell Report.

litigants a second chance to develop their case." *Reliance Ins. Co. v. Louisiana Land and Exploration Co., Inc.*, 110 F.3d 253, 258 (5th Cir. 1997).

The Court finds that the Borrell Report is the antithesis of "detailed and complete." The Report consists of one paragraph containing the superficial assertions that Borrell has reviewed the depositions and exhibits of Larry Smith and Terry Snow, as well as a Child & Adolescent Services Clinical & Case Management Assessment, and that it is Dr. Borrell's conclusion that Justin's suicide could have been prevented if "proper protocol" had been followed and "appropriate diagnosis and treatment" had occurred. Dr. Borrell fails to give any reasons for these opinions, nor does he state with any specificity the facts on which he relies in reaching his conclusions. Dr. Borrell states generally that he is familiar with the "standards of care in juvenile detention facilities," but he does not discuss or describe these standards of care. He does not describe what "proper protocol" is or what the "appropriate diagnosis" might

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Under Rule 16(b), a district judge also has the discretion to exclude expert testimony as a sanction for failure to comply with a pretrial order. *Id.* at 257 (citing *Geiserman v. MacDonald, 893 F.2d 787, 791 (5th Cir. 1990)).*

entail. The Borrell Report provides absolutely no guidance to Defendants or the Court for the basis of the writer's opinions.

Perceiving the weaknesses in their position, Plaintiffs urge that they be allowed to supplement the Borrell Report. Defendant County objects, contending that supplementation of the bare-bones letter would in fact constitute a *"de novo expose"* long after the deadlines for expert disclosure and discovery have expired. Motion to Exclude, at 3. The Court finds that Plaintiffs have not established good cause for why they should be allowed to supplement at this late date, particularly in light of the unfair prejudice the supplementation would cause Defendants. Therefore, Plaintiffs' request to extend all deadlines to permit an untimely revision to the Borrell Report is denied and the Report is stricken as patently insufficient to qualify as admissible expert opinion evidence. The Court concludes

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Indeed, Dr. Borrell's Report is nothing but a boilerplate recitation of the opinions Plaintiffs hope the doctor would reach to support their legal claims.

It is noted also that Plaintiffs have not shown that the Borrell Report and opinions therein meet the reliability and relevance standards *of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136

that Defendant County's Motion to Exclude has merit and will be granted. Plaintiffs may not rely on the Borrell Report to oppose summary judgment at this juncture.

Psychological Evaluations. - Plaintiffs argue that Delta 3 employees were aware of various psychological evaluations that noted Justin's history of depression, suicidal ideation, and a prior suicide attempt. *See* Exs. A-20 through A-22 to Plaintiffs' Mem. It is undisputed that Cheryl Hicks, Justin's caseworker, was aware of these evaluations. Hicks Dep., Vol. 1, at 51. In her assessment of Justin on August 15, 1997, Hicks notes that Justin "verbalizes thoughts of wanting to harm himself," and that Justin had "suicidal ideation, threats, or attempts" within the preceding two months. Hicks Assessment (Ex. 18 to Harris County App. I).

Although Hicks acknowledges that she was aware of the substance of these earlier psychological evaluations, she did not subjectively believe that Justin *was presently* suicidal. Hicks states that Justin had never expressed to her that he was currently suicidal.

(1997),Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), and their Filth Circuit progeny.

She never determined that he was likely to attempt suicide. Hicks Dep., Vol. 1, at 63, Vol. 2, at 72-73. In particular, Hicks spoke with Justin on September 2 and did not observe any signs indicating suicidal tendencies. *Id.* at Vol. 2, at 76. Plaintiffs present no evidence to contradict Hicks's testimony. Also, and more importantly, the evidence amounts to proof, at best, that Hicks should have known *of some possibility* that Justin might attempt suicide. Given Justin's fluctuating behavior and diagnoses by different psychologists and psychiatrists, Plaintiffs have demonstrated that Hicks may have been negligent in failing to recognize Justin's potential for suicide. However, "mere negligence" does not equate with deliberate indifference. *See Wagner*, 227 F.3d at 324; *Hare* III, 74 F.3d at 649.

Defendant County also has offered the testimony of Dr. Matthew Brams, a psychiatrist, as an expert witness. Dr. Brain points out that prior psychological evaluations reveal Justin's suicidal ideation to be "secondary to acute anger and usually of a passive nature, meaning that he wishes he were dead or that someone would take him from this world, but no active suicidal thoughts with a plan or intent." *See* Affidavit of Matthew Brams, M.D. (Ex. 20 to Harris

County App. I) ("Brains Affidavit"), at unnumbered second page. Indeed, Justin' s last psychological evaluation, performed by MHMRA psychiatrist Dr. Terry on August 22, 1997, specifically noted that Justin had no present suicidal intentions. Fifth Circuit precedent indicates that evidence of "passive" suicidal ideation and a prior suicide attempt, *per se*, do not establish a "substantial or significant risk" of serious harm. Thus, Delta 3 employees' failure to recognize the seriousness of Justin's potential suicide risk does not equate to deliberate indifference. *See Flores v. County of Hardeman, Texas*, 124 F.3d 736 (5th Cir. 1997).

In addition, Plaintiffs have failed to proffer any evidence that Wynn or Blue actually knew of the earlier negative psychological evaluations or Hicks's August 15 assessment. Blue denies that he subjectively believed that Justin had the serious intent to kill himself. *See* Blue Aft., ¶ 54 (stating that Blue did not believe at any time that Justin would attempt suicide, and noting that he had previously placed trainees he believed to be suicidal on constant *(i.e.*, suicide) watch).

Superintendent Smith also denies that he read the earlier

psychological evaluations. L. Smith Dep., at 116 (noting that Superintendent Smith did not review Justin's master file and was unaware of the MHMRA evaluations that accompanied Justin upon his admission to Delta 3). Similarly, Smith denies a subjective belief that Justin was actually suicidal. *See* L. Smith Dep., at 115, 117 (denying Smith had any idea that Justin was suicidal, i. e., that he was "intent on ending his own life").

While these post-occurrence assertions are self-serving, they are corroborated by the fact that none of the evaluations made prior to or during Justin's stay at Delta 3 establishes that Justin possessed the intent to cause himself imminent harm. Moreover, Plaintiffs have not submitted probative evidence to genuinely contradict Defendants' proof. Therefore, the Court rejects Plaintiffs' contention that Justin's psychological evaluations create a genuine question of material fact that Defendant County was deliberately indifferent to h/s needs.

Statements of Keith Crouch. -- Plaintiffs also point to statements made by Keith Crouch to support deliberate indifference by the County. Crouch was another boot camp trainee whose room was located near Justin's at Delta 3 in late August and early

September, 1997. Crouch was also on temporary confinement along with Justin on September 2, the day Justin committed suicide. In his sworn statement of September 3, 1997, Crouch stated: "About two and a half weeks ago I met a guy by the name of Justin Smith and he is in room #45 which is next to me. During the past week Justin was saying that he was going to kill himself. I have heard him say it about five times a day. He has also told other D.I.'s [drill instructors], other trainees and his case worker." Crouch Statement, at 1. Plaintiffs do not submit any deposition or affidavit testimony from Crouch.

Plaintiffs claim that these 1997 comments constitute evidence that Delta 3 staff *actually knew* that Justin was suicidal. However, this contention faces several evidentiary hurdles. First, Defendant County correctly notes that Crouch's comment "He has also told other D.I.'s, other trainees and his case worker," is ambiguous as to whether Crouch actually heard Justin tell Delta 3 staff that Justin was going to kill himself, or whether Justin merely told Crouch that he had made those statements. If the latter is the case, the statement constitutes inadmissible hearsay. If, however, Crouch was present when Justin told Delta 3 staff he would kill

himself. Crouch's statement would arguably fit into one of the hearsay exceptions. Plaintiffs have not borne their burden to clarify Crouch's intended meaning. The statement's probative value, in any event, is substantially outweighed by its prejudicial effect. *See* FED. R. EVID. 403. The statement is vague at best, and Plaintiffs have produced no evidence to show that Delta 3 staff actually *heard* Justin say he was going to kill himself, much less that they actually *believed* he would kill himself and disregarded the risk that he would carry out his threats, thus indicating subjective deliberate indifference. Moreover, the statements are vague as to the

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In their Surreply, Plaintiffs contend that Crouch' s statements are admissible because they are not offered to show the truth of the matter asserted, but to show that Delta 3 employees had notice that Justin intended to commit suicide. Plaintiffs also argue that Crouch's statement should be allowed as a hearsay exception under Fed. R. Evid. 803(3) as a "then existing mental, emotional, or physical condition." *See* Plaintiffs' Surreply [Doc.# 110], at 4. The Court need not and does not reach these contentions, except to express serious doubts as to their viability.

It is noted that Crouch has not been deposed, nor has he submitted an affidavit to clarify his recollections for the Court. Nor have Plaintiffs provided any other evidence from Crouch. Finally, Crouch had potentially significant bases for bias against his guards and the Harris County Delta 3 staff, who were strict authority figures to him, as well as Justin.

identity of the individuals to whom Justin made the ominous comments. Crouch's assertions thus are inadmissible to prove that Blue, Wynn or Perry, on September 2 or the week before, had actual knowledge of Justin's intent to commit suicide. The Court also notes that although Crouch was in close proximity to Justin for most of the day on September 2, and had a conversation with Justin shortly before Justin hung himself, Crouch does not state in his 1997 statement that Justin expressed any intent to commit suicide that day. *See generally* Crouch Statement.

The Court recognizes that when all inferences are drawn in favor of Plaintiffs, it is possible for a jury to find on the basis of Crouch's recollections that Justin said to his caseworker, Cheryl Hicks, sometime in the week preceding his suicide, that he wanted to kill himself. Nevertheless, this evidence amounts to a mere scintilla and is insufficient to support a verdict in Plaintiffs' favor against the County. *See Doe*, 153 F.3d at 215. In contrast to Crouch's statements, Hicks has denied that she believed Justin was likely to attempt suicide. Hicks Dep., Vol. 1, at 63; *id.*, Vol. 2, at 72-73. The Court further notes that Hicks had daily contact with Justin, including on

September 2. Therefore, the Court finds that Crouch's 1997 assertions, even if admissible evidence, do not raise a genuine question of fact that Hicks was subjectively deliberately indifferent to a substantial risk that Justin would commit suicide.

Incident Reports. -- Finally, Plaintiffs point to three incident reports in which Delta 3 staff state that Justin was causing various forms of harm to himself. The first report was made on May 23,

1997.[9] That report states, "Trainee is guilty of carving initials on the inside of his forearm." See Incident Report, May 23, 1996 (Ex. A-13 to Plaintiffs' MemO. Plaintiffs have produced no evidence to show that the drill instructor making the report subjectively believed the "carving" behavior indicated that Justin was at risk of committing suicide. Nor have Plaintiffs raised a fact issue that the drill instructor in fact perceived such a risk but chose to disregard it. "Carving" behavior may be indicative of some type of mental distress, but it is not an indisputable marker of suicidal tendencies. *See* Brains Aff., at unnumbered third page. Finally, this reported activity occurred almost three and a half months prior to Justin's actual suicide and thus is not probative of his mental state on or near the date of his death.

Plaintiffs also focus on Blue's Incident and Shift Supervisor Reports and Smith's Exception Report documenting the incident on the night of August 27, 1997, in which Justin was found standing on his table with a sheet. As discussed above, Blue's reports did not reflect any belief that Justin was attempting to commit suicide and

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[9] The report erroneously lists the date as May 23, 1996. Justin was not at Delta 3 in 1996.

Blue's testimony before the Court is consistent with this position. Plaintiffs have proffered no conflicting evidence as to Blue's knowledge. Blue's reports thus do not establish any deliberate indifference on his part.

Superintendent Smith's Exception Report requires a different analysis. Superintendent Smith's report stated that Justin was restrained after he was found tying a sheet around his neck while standing on his table. Smith's report also noted that Justin was placed on constant watch.[.....] Constant watch is the equivalent of suicide watch. *See L. Smith* Dep., at 82-84; Harris County Motion, at 5.

Smith, as well as Defendant County, seek now to dissociate themselves from this report. They vigorously contend that Smith's report was in error, and that Blue's account is accurate, *i.e.*, that Justin was not attempting to commit suicide, but was simply trying to cover the window in his cell. *See* Defendant Harris County's Reply

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[.....] This is a second discrepancy in Blue and Smith's reports. Blue wrote only that Justin had been placed on "close observation," the procedure used to monitor a trainee who had been mechanically restrained. Close observation generally entailed checking on the trainee at least every fifteen minutes. See L. Smith Dep., at 157; Delta 3 Manual, § 4.08.

to Plaintiffs' Response to Defendants Byron Blue and Harris County's Motion for Summary Judgment, at 7-8; L. Smith Dep, at 166-69. This contention is unavailing; at most, Smith's testimony creates an issue of his credibility.

Defendant County also objects to Smith's Exception Report on the ground that the report is unreliable hearsay. This argument also lacks merit. The report reflects Smith's state of mind- that at the time he wrote the report he believed Justin was caught attempting to tie a sheet around his neck. The issue, therefore, is whether Smith's response, or lack thereof, to his expressed understanding of Justin's condition constituted deliberate indifference towards Justin.

Delta 3 procedures mandate that medical and clinical staff must assess trainees when they have been placed in mechanical restraints; however, no referrals to medical or clinical staff were ever made in the aftermath of the August 27 incident. Although Hicks met with Justin after that incident, Justin did not mention this conduct to her, nor was she informed of the incident by other staff.[.....] Hicks

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[.....] In fact, Hicks wrote a memo to Superintendent Smith, complaining of the fact that she had not been informed of the incident. L. Smith Dep., at 139-41.

Dep., Vol. 1, at 132.

According to Delta 3 written procedures,

> *the supervisor* or designee shall also immediately contact medical staff who will provide medical intervention as needed. If medical personnel are not present in the building at the time of restraint, a referral shall be made to that department. These referrals to the respective department(s), Medical and/or Psychological, shall serve to inform them that they are to see the juvenile as soon as possible.

See Delta 3 Manual, § 4.08 (emphasis added). Thus, policy dictated that Blue, the supervisor on duty, should have notified medical and caseworker staff of the incident. However, neither the boot camp nurse nor Hicks were present at Delta 3 on the evening of August 27. *See* Blue Aft., ¶ 15. Blue placed the reports in the box of Bert Carter, Delta 3's assistant superintendent. Carter did not take any other steps to notify medical or casework staff.[.....]

Smith states that he believed Blue would make the referrals

[.....] According to Blue, "[r]eports submitted by me would go through the chain of command to Bert Carter and/or Larry Smith and then were passed on to Brace Levy and then to the caseworkers such as Ms. Hicks or another individual on duty. [Putting the report in Bert Carter's box] was the quickest way I could get the report in the hands of my supervisors and trainee [Justin] Smith's caseworker, Ms. Hicks." Blue Aft., ~] 14. Blue was not scheduled to return to the boot camp until the following afternoon. *Id.*

to the medical and casework staff. L. Smith Dep., at 203. The Shift Supervisor Report is a double-sided form. *See* Delta 3 Manual, App. 24. The back of the form allows space for documentation regarding medical and clinical referrals. Apparently, Blue had checked the appropriate boxes to indicate that referrals had been made. L. Smith Dep., at 207-208. However, neither Hicks nor any other caseworker or medical staff ever received any referrals on this incident, and apparently no such referrals were ever made. *See* Hicks Dep., Vol. 1, at 132; L. Smith Dep., at 139-141; Snow Report, at unnumbered second page.

Smith's only response to Blue's report was to fill out an Exception Report, which was forwarded to Deputy Director Bill Thompson's office and to all Juvenile Court judges. Smith states that his response to Justin's behavior was to "report it immediately [to administration]. And with that decision comes a staffing request from our psych and social services team." L. Smith Dep., at 176. However, no staffing request was ever made. Smith admits that he did not speak with glue the next day. Nor did he speak with Sergeants Perry or Ramirez, the staff members who were also present at the incident

the night before. L. Smith Dep., at 171,174. Smith made no attempts to see Justin, or to ascertain whether Justin still was on suicide watch. Smith made no attempts to see that "a staffing", *i.e.*, *a* meeting between casework and supervisory staff to address special needs of a trainee, in fact occurred.

In light of Smith's Exception Report and his lack of meaningful response to the August 27 incident as he perceived it, the Court finds that there is a genuine issue of material fact as to whether Smith was deliberately indifferent to a substantial risk that Justin would harm himself. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence.., and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan,* 511 U.S. 825, 842 (1994).

Smith denies that he believed Justin was attempting to commit suicide. Smith states that he believed Justin's behavior was an "[attempt] to get people's attention" and merely a "continuing behavioral problem." L. Smith Dep., at 175, 176. However, the Court notes that Smith's notation that Justin had been placed on "constant" (suicide) watch, when in fact Blue only noted that Justin had been placed on "close observation" (fifteen minute checks), also supports the inference that Smith believed Justin to

Given the circumstances Smith believed existed, the Court finds that a fact question exists as to whether Smith demonstrated deliberate indifference. Plaintiffs, however, have not sued Superintendent Smith in his individual capacity. Rather, Plaintiffs seek to recover damages from the County on this basis. Thus, in order to survive summary judgment, Plaintiffs also must demonstrate a fact question on the second prong of the test for municipal liability- *i.e.*, that the violation of Justin's rights resulted from an official municipal policy. This aspect of the case is analyzed in the next section of this opinion.[.....]

b. Violations Caused by Municipal Policy

In order to succeed on a claim of municipal liability based on an episodic act or omission, the plaintiff must also show that the constitutional violation resulted from an official municipal policy.

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be suicidal.

[.....] It is noted that Plaintiffs do not appear to contend that Superintendent Smith was a policymaker. Thus, the fact issue of Smith's deliberate indifference is not a "material" question to bar summary judgment against Plaintiffs. Nevertheless, because of the seriousness of the injury to Justin, the Court analyzes Plaintiffs' contentions concerning alleged municipal policies.

Plaintiffs have identified three alleged municipal policies that they claim caused Justin's death. First, Plaintiffs contend that the practice of pre-signing forms was a widespread practice at Delta 3. Plaintiffs claim that this practice allowed Blue and Wynn to abandon their duty of monitoring Justin while he was in temporary confinement. Second, Plaintiffs allege that HCJPD failed to train its employees adequately in recognizing suicidal symptoms and following up on trainees who had been identified as suicidal or potentially so. In connection, Plaintiffs claim that Delta 3 was inadequately staffed, and that, as a result, Justin was improperly monitored. Third, Plaintiffs contend that Bill Thompson, Deputy Director of Institutions for HCJPD, was an official with final policymaking authority. Plaintiffs allege that Thompson was deliberately indifferent to Justin's suicidal tendencies, and that his deliberate indifference binds Defendant County.

Official Policymaker for HCJPD. - State law determines which officials have final policymaking authority in a given area of government operations. *Jett v. Dallas Indep. School District*, 7 F.3d 1241, 1245 (5th Cir. 1994). Texas law mandates the creation of a juvenile board for Harris County which acts subject to the approval

of the commissioners' court. TEXAS HUMAN RESOURCES CODE § 152.1071. The Harris County Juvenile Board sets general personnel policy, establishes the HCJPD's employee classification system, and prescribes the duties and qualifications for each position, subject to the approval of the County Commissioners' Court. *Id.*, § 152.1071(c). The Harris County Juvenile Board investigates and makes reports to the County Commissioners' Court on the efficiency and operations of the Harris County Juvenile Probation Department. *Id.*, § 152.1071(d).

On the surface, it is unclear whether the Harris County Commissioners' Court or the Harris County Juvenile Board is the final policymaker for the HCJPD. Fifth Circuit precedent states generally that an "entity whose decisions are reviewable is not a policymaker whose acts can subject the municipality to liability." *Gros v. City of Grand Prairie, Texas*, 181 F.3d 613, 619 (5th Cir. 1999). Nevertheless, in *Flores v. Cameron County, Texas*, *92* F.3d 258, 269 (5th Cir. 1996), the court of appeals held that the Juvenile Board of Cameron County was the final policymaker for a detention enter run by the county's juvenile probation department, over

Cameron County's protestations that its Commissioners' Court was the appropriate policymaking entity. Defendant Harris County does not contend that its Commissioners' Court is the final policymaker for HCJPD. Rather, the County's evidence indicates that the Juvenile Board is the final policymaker. *See* Harris County App. II.

The Court nevertheless need not determine conclusively whether the final policymaker for the HCJPD is the County Commissioners' Court or the Juvenile Board. Plaintiffs do not establish that any official policies of either of these entities caused a constitutional violation.

Pre-signing of Room Check Forms. - A plaintiff may allege that official policy exists "when the appropriate officer or entity promulgates a generally applicable statement of policy and the subsequent act complained of is simply an implementation of that policy." *Burge v. Parish of St. Tammany*, 187 F.3d452, 471 (5th Cir.

However, the state statute instituting the Cameron County Juvenile Board, *see TEXAS* HUMAN RESOURCES CODE § 152.0372, differs significantly from the statute creating the Harris County Juvenile Board.

1999) (citations omitted). The "official policy" need not be formally adopted by the policymaking body, but can be established through "a persistent, widespread practice which, although not officially promulgated, is 'so common and well settled as to constitute a custom that fairly represents municipal policy.'" *Esteves v. Brock,* 106 F.3d 674, 677 (5th Cir.), *cert. denied,* 522 U.S. 828 (1997) (citations omitted). "Isolated violations are not the persistent, often repeated constant violations that constitute custom and policy as required for municipal section 1983 liability." *Campbell v. City of San Antonio,* 43 F.3d 973, 977 (5th Cir. 1995) (internal quotations and citations omitted).

The Court has found that the pre-signing of room check forms did not violate Justin's constitutional right to be free from self-inflicted harm. *See supra* Section III.A.1.b, at 23-25. The Court therefore need not reach the issue of whether pre-signing in fact constituted an official policy. In addition, assuming arguendo that Plaintiffs have created a fact issue as to whether pre-signing was in fact common practice at Delta 3,[.....] Plaintiffs have not produced

[.....] Both Blue and Wynn admitted that they pre-signed forms, and noted that others at Delta 3 did also. Blue Aff., ~] 47 (noting that

any evidence that the *policymakers* for Delta 3 at either the Juvenile Board or Commissioners' Court levels *knew* that pre-signing occurred. Thus, Plaintiffs cannot support a claim for municipal liability based on the pre-signing of forms at Delta 3.

Failure to Train/Staff. - Plaintiffs claim that Defendant County failed to train its employees to recognize suicidal tendencies and to properly follow-up once a suicidal risk had been identified. "Official policy" may exist "[e]ven when the policymaker fails to act affirmatively at all, if the need to take some action to control the agents of the local governmental entity 'is so obvious, and the inadequacy [of existing practice] so likely to result in the violation

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drill instructors and supervisors pre-signed forms, though only when they "knew the checks would be done anyway"); Wynn Statement ("most people just sign [the room check forms] all the way .... Most of the time there is too much going on to actually sign them every fifteen minutes"). *See also* Hicks Dep., Vol. 2, at 8-9 (stating that she had seen pre-signed forms on some occasions). Other Delta 3 and HCJPD personnel deny that pre-signing was a common practice. See L. Smith Dep., at 106-07; Thompson Dep., at 115-16; Affidavit of Elmer Bailey (Ex. 21 to Harris County App. I); Affidavit of Bert Carter (Ex. 22 to Harris County App. I. The Snow Report states that "'most of the supervisors and DI's pre signed forms,' this was common knowledge." However, the statement is not only inadmissible hearsay, but also fails to establish any policymakers knew of the alleged practice.

of constitutional rights, that the policymake[r] ... can reasonably be said to have been deliberately indifferent to the need.'" *Burge,* 187 F.3d at 471. "Deliberate indifference is a stringent standard, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown v. Bryan County,* 219 F.3d 450, 457 (5th Cir. 2000).

In order to prevail on a failure to train claim, Plaintiffs must show that (1) the training procedures of the municipality's policymaker were inadequate; (2) the municipality's policymaker was deliberately indifferent in adopting the hiring or training policy; and (3) the inadequate hiring or training policy directly caused the plaintiff's injury. *Conner v. Travis County,* 209 F.3d 794 (5th Cir. 2000) (quoting *Baker v. Putnal,* 75 F.3d 190, 200 (5th Cir. 1996). As the Fifth Circuit noted in *Conner,*

> We have previously noted the difficulty plaintiffs face in attempting to show deliberate indifference on the basis of a single incident .... This difficulty is necessarily heightened for the [plaintiffs] because of the type of case they bring *[i.e.,* a failure to train claim]. We can reasonably expect-if the need for training in this area was 'so obvious' and the failure to train was 'so likely to result in the violation of constitutional rights'- that the [plaintiffs] would be able to identify other instances of harm arising from the failure to train. The fact that they did not do so undercuts their

deliberate indifference claim.

Id. at 797.

Plaintiffs have not produced any evidence that the policymakers for Delta 3 were *deliberately indifferent* to suicidal trainees at Delta 3. Justin's suicide was the first suicide to occur at Delta 3. In addition, at least one trainee had been removed from Delta 3 in the past because of suicidal tendencies. L. Smith Dep., at 69. Plaintiffs have made no showing that it was "obvious" that a suicide would result, given the amount of training required for Delta 3 staff. Staff members were required to undergo annual certification in crisis prevention and intervention and were trained to recognize suicidal behaviors. Caseworkers maintained daily contact with trainees and were authorized to refer trainees for psychiatric evaluation. Justin himself was evaluated by mental health personnel three times in the month before his suicide; no evaluation revealed him to be acutely suicidal. The bulk of Plaintiffs' arguments are centered on the August 27 incident, and the failure of Blue or Smith to properly refer the matter to medical and casework staff.[.....]

[.....] Although a fact issue exists as to whether Smith was deliberately indifferent to the risk that Justin would commit suicide,

However, this failure constitutes a violation of established procedure, not a lack of procedure. Ideally, of course, Delta 3 would have had a psychologist or psychiatrist on site. Ideally, direct services staff (drill instructors, floor supervisors, and shift supervisors) would have been informed that Justin's daily Prozac dosage had been increased.[.....] However, these shortfalls, which evince negligent conduct, are not omissions so glaring or obvious that Delta 3's final policymakers can be said to have been deliberately indifferent.

Plaintiffs also allege that a failure to adequately staff the Delta 3 boot camp led to improper supervision of Justin and, eventually, to his suicide. At the time of Justin's death, Delta 3 housed 110 trainees. *See* Juvenile Custodial Death Report. Its rated capacity was 100 trainees. Plaintiffs also point to the alleged practice of pre-signing forms as a timesaving measure as evidence that the boot camp was overcrowded and that staff were unable to perform

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Plaintiffs have not connected his failure to take additional action to a concrete municipal policy, or lack of policy.

[.....] Superintendent Smith admits that he knew of no formal mechanism by which direct services staff would have been informed of the side effects of any change in medication. L. Smith Dep., at 136-37.

their duties properly.[.....]

Again, Plaintiffs have not produced any evidence that Delta 3's policymakers were deliberately indifferent to the 10% over-population issue or to Justin's needs in light of these circumstances.[.....] In addition, although Blue was forced to reshuffle staff on the afternoon and evening of September 2, a floor supervisor was available to monitor the trainees in temporary confinement at all times.

While Plaintiffs have shown that the training and staffing levels at Delta 3 may have been less than desirable, Plaintiffs have not produced evidence showing a deliberately indifferent mindset on

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[.....] Plaintiffs have also produced a grievance letter written by a caseworker. See Memorandum from Alexander O. Eze to Bert Carter, January 20, 1998 (Ex. A- 18 to Plaintiffs' Mem0. The grievance letter mainly addresses personal conflicts between the caseworker and the lead therapist at Delta 3, and is largely irrelevant. Moreover, insofar as the letter opines that some caseworkers were given large caseloads, it does not address Cheryl Hicks', Justin's caseworker, caseload. Hicks herself denied that she was overburdened. Hicks Dep., at 23-24.

[.....] To the extent that the Harris County Monitoring Summary for the Fiscal Year 1999 (Ex. A-14 to Plaintiffs' Memo is relevant, given its date, the report indicates that the boot camp was to be expanded to 150 beds. *Id.* at 2.

the part of final policymakers. Therefore, Plaintiffs cannot sustain a claim for municipal liability based on a failure to train or adequately staff theory.

Thompson as Final Policymaker. - A plaintiff can properly allege "official policy" for purposes of municipal liability under § 1983 "[w]hem no 'official policy' was announced or promulgated but the action of the policymaker itself violated a constitutional right." *Burge,* 187 F.3d at 471 (citations omitted). Thus, a "final decisionmaker's adoption of a course of action 'tailored to a particular sitation and not intended to control decisions in later · situations'" may give rise to municipal liability. *Brown,* 219 F.3d at 457 (internal citations omitted). There must, however, be evidence of "deliberate indifference," and a "showing of simple or even heightened negligence will not suffice." *See Brown,* 219 F.3d at 457. Moreover, in order to show the causation requirement that the municipal officer's decision was the moving force behind the"violation of rights, "them must be evidence that would support a finding that it was obvious that the offending officer in question was 'highly likely to inflict the particular injury suffered by the plaintiff.'" *Id.* at 461

(quoting *Bryan County v. Brown,* 520 U.S. 397, 411 (1997)).

Plaintiffs claim that Bill Thompson was delegated final policymaking authority, and that he was deliberately indifferent to Justin's suicidal tendencies. Plaintiffs contend that Thompson received Smith's Exception Report stating that Justin had been placed on constant (suicide) watch for tying sheets around his neck while standing on a table, and that Thompson's lack of response constitutes deliberate indifference.[...]

The threshhold question here is whether Thompson was a

[...] The only action Thompson's office took regarding Smith's exception report was to contact *Smith after* Justin's suicide on September 2, 1997, asking him to "reconcile" his exception report with Blue's incident report (which stated that Justin was standing on his table with a sheet/blanket only in order to cover the window on his cell door). *See* Memorandum from Larry A. Smith to Bill Thompson, September 8, 1997 (Ex. 13 to Harris County App. I) (stating that Smith's prior exception report was in error); Snow Dep., at 66; L. Smith Dep., at 180-81 (noting that Thompson's office called Smith to discuss his exception report after Justin's suicide).

However, Plaintiffs have not pointed to evidence that Thompson in fact was aware of Smith's report. Thompson states that it was Snow's duty to read the exception reports, and that he has no recollection of her discussing the August 27 incident with him prior to Justin's suicide on September 2. Thompson Dep., at 130. Snow states that she does not recall when Thompson's office received Smith's report, though she believes the report was not discovered until after Justin's actual suicide. Snow Dep., at 66.

final policymaker. The question of whether an official has been delegated final policymaking authority is a question of law for the judge. *Gros,* 181 F.3d at 617 (citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701,737 (1989)). The Supreme Court has explicitly rejected the notion that an official can possess *"de facto"* policymaking authority. *See Flores v. Cameron County, Texas,* 92 F.3d at 269 (quoting *City of St. Louis v. Prapotnik,* 485 U.S. 112, 131 (1988)). The "fact that the official policymaker simply goes along with a subordinate's discretionary decisions is not a delegation of policymaking authority." *Id.* (internal citations omitted). *See id.* at 269-70 (holding that chief juvenile probation officer had not been delegated final policymaking authority to develop policies for the operation of detention center where he was *"de facto"* policymaker but had not been formally delegated policymaking authority by Juvenile Board). In *Bennett v. City of Slidell,* 728 F.2d 762, 769 (5th Cir. 1984), the Fifth Circuit set forth the requirements for finding a delegation of policymaking authority:

> The governing body may delegate policymaking authority in either of two ways. It may delegate policymaking power by an express statement, by a job description or by other formal action. Or it may, by its conduct or practice, encourage or

> acknowledge the agent in a policymaking role. In either case, the delegation of policymaking authority requires more than a showing of mere discretion or decision making authority on the part of the delegee. The governing body must expressly or impliedly acknowledge that the agent or board acts in lieu of the governing body to set goals and to structure and design the area of the delegated responsibility, subject only to the power of the governing body to control finances and to discharge or curtail the authority of the agent or board.

See Eugene v. Alief Independent School District, 65 F.3d 1299, 1304-05 (5th Cir. 1995) (holding that plaintiff failed to show that school principal was final policymaker regarding school security; plaintiff's "bare assertion" that Texas Education Agency adheres to a "site-based management philosophy" did not create a genuine issue of fact regarding delegation of authority to principal).

Moreover, when alleging municipal liability based on the single decision of an employee, the plaintiff must show that the employee possesses policymaking authority with respect to the decision at issue. For example, the "County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions

with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability." *Jett*, 7 F.3d at 1247.

Thus, Plaintiffs must also show that Thompson was expressly or impliedly delegated final policymaking authority with respect to the matter about which he allegedly displayed deliberate indifference, *i.e.*, *the* decision to "do nothing" after learning that Justin had attempted suicide. Plaintiffs appear to argue only that Thompson *must* be a policymaker simply by virtue of his rifle as Deputy Director of Institutions. Plaintiffs' Mem., at 24. Plaintiffs further claim that Thompson generally had been delegated final policymaking authority, but they do not identify the specific areas of policymaking for which he was responsible. Plaintiffs also have produced no evidence that Thompson was expressly or impliedly delegated any policymaking authority. Thompson's power to make changes to the Delta 3 Manual[.....] does not constitute evidence of an implied delegation of policymaking authority. There is no

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[.....] Thompson stated that he might have input into revisions of the *Manual*, *see* Thompson Dep., at 78.

evidence that the County had acknowledged that Thompson had authority to act on any given issue involving the institutional policies or population of HCJPD in lieu of either the Juvenile Board or the County Commissioners' Court.

Thus, the Court concludes that Plaintiffs have not sustained their summary judgment burden to raise a genuine fact question that Thompson was a final policymaker for Delta 3. Plaintiffs' evidence is insufficient to support a claim for municipal liability arising from Thompson's conduct in relation to Justin's death.

B. Claims Under the Texas Tort Claims Act

In Texas, a governmental unit is immune from tort liability unless the Texas legislature has waived immunity. *Dallas Cry. Mental Health and Mental Retardation v. Bossley,* 968 S.W.2d 339,341 (Tex. 1998) *(citing Harris County v. Dillard,* 883 S.W.2d 166, 168 (Tex. 1994)). The Texas Tort Claims Act ("TTCA") provides for the waiver of governmental immunity in cases of personal injury and death caused by a "condition or use" of tangible or real government property. TEX. CIV. PRAC. & REM. § 101.021.

Plaintiffs allege a claim for wrongful death under the TTCA.

According to Plaintiffs, the protective covering around the Overhead sprinkler in Justin's cell, from which Justin hung himself, was improperly secured, allowing Justin to wrap his sheet around the sprinkler head.

Plaintiffs therefore contend that a condition of government property proximately caused Justin's death.[.....]

The TTCA is a waiver of sovereign immunity; the TTCA provides that state governmental units may be held liable for

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[.....] In their Complaint, Plaintiffs alleged that Defendant County and/or Defendant Blue were negligent in failing to remove certain items of tangible property (towel, bed sheet, clothing, and shoes) from Justin's cell. *See* Complaint, ¶¶ 55-61. However, in their response to Defendants' motions for summary judgment, Plaintiffs specifically disavow any claim under the TTCA for the negligent use or misuse of property. *See* Plaintiffs' Memorandum, at 25-26. Plaintiffs have presented neither argument nor evidence to support a claim based on the negligent failure to remove items of tangible property from Justin's cell.

In their response to Defendants' motions for summary judgment, Plaintiffs argue that the allegedly defective sprinkler head constitutes a"conditions" claim against Defendant County under the TTCA. Plaintiffs' Mere., at 25-27. While Plaintiffs did not include an explicit "conditions" claim under the TTCA regarding the sprinkler head, their Complaint does allege that the sprinkler head was defective, and that Defendant County owed Justin a duty to maintain the sprinkler system in a safe condition. *See* Complaint, ¶ 27. The Court therefore construes the complaint to allege a TTCA claim against Defendant County only, and not against Defendant Blue.

"personal injury and death so caused by a condition or use of personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." TEX. CIV. PRAC. & REM. § 101.021. Section 101.021 has been interpreted to provide a general negligence standard. *State of Texas v. San Miguel,* 981 S.W.2d 342, 346 (Tex. App.-Houston [14th Dist.] 1998) *(rev'd on other grounds,* 2 S.W.3d 249 (Tex. 1999)); *Texas Dept. of Transportation v. Townsend,* 548 S.W.2d 935, 940 (Tex. App.-Houston [14th Dist.] 1992, writ denied). However, "[if] a claim arises from a premises defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises." TEX. CIV. PRAC. & REM. § 101.022. That duty requires that a landowner "not injure a licensee by willful, wanton or grossly negligent conduct, and that the owner use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." *State Dept. of Highways and Public Transportation v. Payne,* 838 S.W.2d 235, 237 (Tex. 1992).

Although Plaintiffs have argued a "conditions" claim under § 101.021, the Court concludes that their claim is actually one for a premises defect under § 101.022. A premises defect is a "defect or dangerous condition arising from a condition on the premises." *San Miguel,* 981 S.W.2d at 347 (quoting *Univ. of Texas Medical Branch at Galveston v. Davidson,* 88 S.W.2d 83, 85 (Tex. App.-Houston [14th Dist.] 1994, n.w.h.). A premises is a "building or part of a building with its grounds or other appurtenances." *Id.* (quoting *Billstrom v. Memorial Medical Ctr.,* 598 S.W.2d 642, 646 (Tex. App.-Corpus Christi 1980, n.w.h.)). An appurtenance is "an article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold." *Id.*

The fire protection sprinkler system at Delta 3, including the sprinkler head in Justin's cell, is an appurtenance. Therefore, any defect in the sprinkler must be considered a premises defect. *See Davidson,* 882 S.W.2d 83 (defect in elevator constituted a premises defect); *Billstrom,* 598 S.W.2d 642 (defective security screen on window constituted a premises defect); *State of Texas v. Tennison,* 509 S.W. 2d 560 (Tex. 1974) (negligently waxed floor constituted a

premises defect). In contrast, "injuries caused by a hospital bed with no side rails, portable traffic control devices, or an unattached wall divider arise from the condition or use of tangible personal property." *San Miguel,* 981 S.W.2d at 347 (citations omitted).

In order to prove a premises defect, the plaintiff/licensee must show the following: (1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition; (4) the owner failed to exercise ordinary care to protect the licensee from danger; (5) the owner's failure was a proximate cause of injury to the licensee. *Payne,* 838 S.W.2d at 237 (citing *Tennison,* 509 S.W.2d at 561).

As a matter of law, Plaintiffs cannot meet the requirements for a premises defect claim under the TTCA relating to the sprinkler in Justin's cell. Plaintiffs have not produced any evidence that Harris County personnel *actually knew* that the sprinkler heads constituted a "tie-off point" from which a suicidal trainee might hang himself. *See* L. Smith Dep., at 121-22, 125 (noting that boot camp premises, including sprinkler system, were inspected weekly and that Smith

was aware of no defect). In addition, Plaintiffs cannot show that Justin was unaware of the defective condition of the sprinkler: as Defendant County points out, Justin himself tampered with the sprinkler's protective covering in order to fit his sheet around the sprinkler head. Harris County Motion, at 34-35; L. Smith Dep., at 120, 125.

Therefore, the Court finds that Plaintiffs cannot state a "conditions" claim under Texas law and cannot meet the legal requisites for a "premises defect" claim under the TTCA.

C. Conspiracy Claim under § 1985

In their Complaint, Plaintiffs also allege that various Harris County officials engaged in a conspiracy under 42 U.S.C. § 1985 to cover up the circumstances of Justin's death. Complaint, ¶¶ 50-54. When paramedics arrived at the scene of Justin's suicide at 8:40 p.m., one of the paramedics, Shelley Squires, noted that the room check form had been signed as if room checks had been performed through 10:45 p.m. *See* Squires Statement, at 2. She later noticed that the sheet was missing. Squires inquired about the sheet to a police officer, who, after speaking with Blue, produced another room check

sheet. This sheet showed checks initialed only until 6:15 p.m. After Squires told the police officer that this was not the original room check form, Blue produced the original form. *Id. In* addition, the record indicates that HCJPD began an internal investigation of Bruce Levy, the casework supervisor at Delta 3, who allegedly discarded some of Justin's records on the night Justin committed suicide. *See L.* Smith Dep., at 218 (referencing Deposition Ex. 22, Memorandum from William Thompson to Harvey Hetzel, April 7, 1998, regarding "Names of Staff Who May Have Witnessed Brace Levy Discarding Records the Night of Justin Smith's Suicide"). *But see id.* at 226 (noting that Smith believed the allegations against Levy to be spurious).

In his affidavit, Blue admits that he altered the room check forms on the night of Justin's suicide.[.....] Blue Aff., ¶¶ 50-52. Blue states that he decided to change the forms and "discussed this with other staff members." *Id.* at ¶ 51. The Court notes that Blue initially

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[.....] Plaintiffs have not argued that Blue's changing forms after Justin's suicide is indicative of deliberate indifference to Justin before Justin's death, and the Court does not find it to constitute such evidence.

cross-claimed against Defendant County, stating that various county officials, including Thompson, Smith, Levy, Elmer Bailey and others, conspired to "scapegoat" Blue for Justin's death. *See* Defendant Byron Keith Blue's Second Amended Original Answer and Cross-Claim [Doe. # 58], ¶¶-79-82. Blue later stipulated to dismissal of these cross-claims.[.....] *See* Does. # 72, 74.

Plaintiffs' § 1985 conspiracy claim is legally insufficient. Plaintiffs have failed to allege or point to evidence to support all the elements of a conspiracy claim. In particular, Plaintiffs do not satisfy the requirement that the conspiracy be motivated by class- or race-based animus. *See Hilliard v. Ferguson,* 30 F.3d 649, 653 (5th Cir. 1994); *Bryan v. City of Madison, Mississippi,* 213 F.3d 267, 277 n. 17 (5th Cir. 2000) *pet. for cert. filed* (Nov. 15, 2000) (No. 00-802) (noting that a single plaintiff making a claim under § 1985(3) must assert membership in a larger protected class) As such, Defendant County is entitled to summary judgment on the conspiracy claim.

IV. CONCLUSION

[.....] Blue also alleged a cross-claim against Defendant County for contribution in the event he is found liable in this case. That cross-claim is hereby dismissed as moot.

Plaintiffs have failed to meet their summary judgment burden to sustain their § 1983 claim against Defendant Blue in his individual capacity. Plaintiffs have failed to raise a genuine fact question that Blue demonstrated subjective deliberate indifference to a substantial and serious risk that Justin would commit suicide. Plaintiffs' § 1983 claims against Defendant County also fail on this summary judgment record because Plaintiffs have not shown evidence sufficient to establish municipal liability for the episodic act or omission of one or more municipal employees. Although a fact question exists as to whether Superintendent Larry Smith displayed subjective deliberate indifference to a substantial and serious risk that Justin would commit suicide as the Superintendent understood the situation, Plaintiffs have not established the existence of an official municipal policy that caused a violation of Justin's right to be flee from self-inflicted harm.

Plaintiffs' wrongful death action under the Texas Tort Claims Act also fails. Plaintiffs have not alleged a "conditions" defect, and cannot succeed on a claim for premises defect. Plaintiffs cannot show that Defendant County actually knew of the alleged premises defect

(i.e., the sprinkler head in Justin's cell which provided a tie-off point, from which Justin hung himself), and because they cannot show that Justin did not have knowledge of the alleged defect.

Finally, Plaintiffs' conspiracy claim under 42 U.S.C. § 1985 must be dismissed. Plaintiffs have failed to allege or provide evidence on all the elements necessary to such a claim since there is no indication of an agreement resulting from class-based animus. It is therefore

ORDERED that Defendant Harris County's Motion to Exclude Testimony of Plaintiffs' Experts Thomas A. Rosazza and Leo J. Borrell, M.D. [Doe. # 95] is GRANTED;

ORDERED that Defendant Byron Keith Blue's Motion for Summary Judgment [Doe. # 97] is GRANTED;

ORDERED that Defendant Harris County's Motion for Summary Judgment [Doc. # 93] is GRANTED;

ORDERED that Defendant Blue's cross-claim against Defendant County for contribution [Doc.# 58] is DISMISSED as moot;

ORDERED that Plaintiffs shall show cause why Defendant

Wynn should not be dismissed from this lawsuit. If Plaintiffs wish to contest the dismissal of Wynn from this lawsuit, they must file a memorandum of points and authorities on or before 5:00 p.m., December 29, 2000. If Plaintiffs fail to timely file their memorandum, Wynn will be dismissed from this suit and a final judgment issued.

SIGNED at Houston, Texas, this 21st day of December, 2000

NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII--EXCESSIVE BAIL, FINES, PUNISHMENTS

Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL

PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS;

PUBLIC DEBT; ENFORCEMENT

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX "E"

UNITED STATES CODE ANNOTATED TITLE 42.
THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I

§§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX "F"

UNITED STATES CODE ANNOTATED TITLE 28.
JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT

§§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX "G"

UNITED STATES CODE ANNOTATED RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

ARTICLE VI. WITNESSES

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

APPENDIX "H"

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED PENAL CODE
TITLE 8. OFFENSES AGAINST PUBLIC ADMINISTRATION
CHAPTER 37. PERJURY AND OTHER FALSIFICATION

§§ 37.09. Tampering With or Fabricating Physical Evidence

(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) This section shall not apply if the record, document, or thing concealed is privileged or is the work product of the parties to the investigation or official proceeding.

(c) An offense under Subsection (a) or Subsection (d)(1) is a felony of the third degree. An offense under Subsection (d)(2) is a Class A misdemeanor.

(d) A person commits an offense if the person:

(1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent

investigation of or official proceeding related to the offense; or

(2) observes human remains under circumstances in which a reasonable person would believe that an offense had been committed, knows or reasonably should know that a law enforcement agency is not aware of the existence of or location of the remains, and fails to report the existence of and location of the remains to a law enforcement agency.

APPENDIX "I"

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED FAMILY CODE
TITLE 3. JUVENILE JUSTICE CODE
CHAPTER 51. GENERAL PROVISIONS

§§ 51.02. Definitions

In this title:

(1) "Aggravated controlled substance felony" means an offense under Subchapter D, Chapter 481, Health and Safety Code, that is punishable by:

(A) a minimum term of confinement that is longer than the minimum term of confinement for a felony of the first degree; or

(B) a maximum fine that is greater than the maximum fine for a felony of the first degree.

(2) "Child" means a person who is:

(A) ten years of age or older and under 17 years of age; or

(B) seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

(3) "Custodian" means the adult with whom the child resides.

(4) "Guardian" means the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court.

(5) "Judge" or "juvenile court judge" means the judge of a juvenile court.

(6) "Juvenile court" means a court designated under Section 51.04 of this code to exercise jurisdiction over proceedings under this title.

(7) "Law-enforcement officer" means a peace officer as defined by Article 2.12, Code of Criminal Procedure.

(8) "Nonoffender" means a child who:

(A) is subject to jurisdiction of a court under abuse, dependency, or neglect statutes under Title 5 for reasons other than legally prohibited conduct of the child; or

(B) has been taken into custody and is being held solely for deportation out of the United States.

(9) "Parent" means the mother or the father of a child, but does not include a parent whose parental rights have been terminated.

(10) "Party" means the state, a child who is the subject of proceedings under this subtitle, or the child's parent, spouse, guardian, or guardian ad litem.

(11) "Prosecuting attorney" means the county attorney, district attorney, or other attorney who regularly serves in a prosecutory capacity in a juvenile court.

(12) "Referral to juvenile court" means the referral of a child or a child's case to the office or official, including an intake officer or probation officer, designated by the juvenile board to process children within the juvenile justice system.

(13) "Secure correctional facility" means any public or private residential facility, including an alcohol or other drug treatment facility, that:

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility; and

(B) is used for the placement of any juvenile who has been adjudicated as having committed an offense, any nonoffender, or any

other individual convicted of a criminal offense.

(14) "Secure detention facility" means any public or private residential facility that:

(A) includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in the facility; and

(B) is used for the temporary placement of any juvenile who is accused of having committed an offense, any nonoffender, or any other individual accused of having committed a criminal offense.

(15) "Status offender" means a child who is accused, adjudicated, or convicted for conduct that would not, under state law, be a crime if committed by an adult, including:

(A) truancy under Section 51.03(b)(2);

(B) running away from home under Section 51.03(b)(3);

(C) a fineable only offense under Section 51.03(b)(1) transferred to the juvenile court under Section 51.08(b), but only if the conduct constituting the offense would not have been criminal if engaged in by an adult;

(D) failure to attend school under Section 25.094, Education Code;

(E) a violation of standards of student conduct as described by Section 51.03(b)(5);

(F) a violation of a juvenile curfew ordinance or order;

(G) a violation of a provision of the Alcoholic Beverage Code applicable to minors only; or

(H) a violation of any other fineable only offense under Section 8.07(a)(4) or (5), Penal Code, but only if the conduct constituting the offense would not have been criminal if engaged in by an adult.

(16) "Traffic offense" means:

(A) a violation of a penal statute cognizable under Chapter 729, Transportation Code, except for:

(i) conduct constituting an offense under Section 550.021, Transportation Code;

(ii) conduct constituting an offense punishable as a Class B misdemeanor under Section 550.022, Transportation Code; or

(iii) conduct constituting an offense punishable as a Class B misdemeanor under Section 550.024, Transportation Code; or

(B) a violation of a motor vehicle traffic ordinance of an incorporated city or town in this state.

(17) "Valid court order" means a court order entered under Section 54.04 concerning a child adjudicated to have engaged in conduct indicating a need for supervision as a status offender.